Supreme Court, U.S.
FILED

No. 09-626 NOV 24 2009

IN THE OFFICE OF THE CLERK
Supreme Court of the United States

Thomas, Glenna and Kayla Loch,

Petitioner,
v.

Edwardsville Community Schools, District No. 7,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Thomas H. Loch
Glenna H. Loch
Kayla N. Loch

Petitioners, Pro Se
5 Goldenrod Lane
Edwardsville, Illinois 62025
(618) 656-1908
(314) 952-3960

QUESTIONS PRESENTED

Whether the determination of a hearing officer that a child is not eligible within the meaning of the Individual with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*., is reviewed under a *de novo* review standard, as four court of appeals have held, or the "clear error" standard, as three other court of appeals have held?

Is the *Board of Education v. Rowley* "due weight" deference and "educational benefit" analysis applicable, in the judicial review regarding whether a child was improperly denied special education and related services, within the meaning of the Individual with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*.?

PARTIES TO THE PROCEEDINGS

Petitioner, Thomas, Glenna and Kayla Loch are individual United States citizens who reside in Edwardsville, Illinois. The Edwardsville Community Schools, District No. 7, one of the defendants below, is a political subdivision of the State of Illinois.

CORPORATE DISCLOSURE STATEMENT

The petitioner are individual U.S. citizens, representing themselves, *pro se* in this matter.

TABLE OF CONTENTS

	Page
Questions Presented	ii
Parties to the Proceedings	iii
Table of Contents.....	iv
Table of Cited Authorities.....	ix
Petition For a Writ of Certiorari.....	1
Opinions Below	1
Statement of Jurisdiction	2
Statutory Provisions Involved.....	2
Statement of the Case.....	3
A. Statutory Framework.....	4
B. Factual and Procedural Background.....	8
C. Due Process Hearing.....	13
D. District Court Proceedings.....	14
E. The Seventh Circuit's Decision....	16

TABLE OF CONTENTS-Continued

REASONS FOR GRANTING THE WRIT... 17

I. COURT OF APPEALS ARE IRRECONCILABLY DIVIDED REGARDING STANDARD OF REVIEW TO BE UTILIZED IN IDEA CASES..... 20

A. Four Courts Of Appeals Apply *De Novo* Standard Of Review In IDEA Eligibility Cases..... 21

B. The Fourth, Seventh & Ninth Court of Appeals Apply "Clearly Erroneous" Standard of Review In IDEA Eligibility Cases..... 23

II. THE DETERMINATION OF IDEA ELIGIBILITY AND WHETHER A CHILD HAS A DISABILITY REQUIRES De Novo REVIEW..... 26

III. CIRCUIT COURT SPLIT CAUSING INCONSISTENT AND INEQUITABLE OUTCOMES IN IDEA ELIGIBILITY CASES..... 28

TABLE OF CONTENTS - CONTINUED

A. Fourth, Seventh and Ninth Circuits Inappropriately Utilizing *Rowley* "Educational Benefit" In Determining IDEA Eligibility 28

IV. NEITHER DECISION BELOW, NOR THE STANDARDS OF REVIEW OF THE FOURTH, SEVENTH, AND NINTH CIRCUITS CAN BE RECONCILED WITH A PLAIN READING OF THE IDEA'S STATUTORY TEXT..... 32

V. THIS CASE IS AN APPROPRIATE VEHICLE FOR DECIDING THE QUESTION PRESENTED..... 35

A. The Issues Presented Were Squarely Decided Below; There Are No Impediments To This Court Granting Petitioners' The Relief They Seek, And The Circuit Split Over The Issue Is Now Mature and Ripe For This Court's Review..... 35

CONCLUSION..... 36

TABLE OF CONTENTS-Continued

APPENDIX

The unpublished decision denying the Petitioners' petition for re-hearing or rehearing en banc on August 26, 2009, affirming the Seventh Circuit Court of Appeals panel decision, WL 1747897..... A-1

The published nonprecedential decision of the United States Court of Appeals for the Seventh Circuit in *Loch, et al., v. Edwardsville School District No. 7*, decided on June 19, 2009 affirming the District Court's decision granting summary Judgment in favour of the Respondents Reported at 327 Fed.Appx. 647..... A-2

The unpublished decision of the United States District Court for the Southern District of Illinois in *Loch, et al., v. Edwardsville School District No. 7* (Civil File No. 06-CV-0017-MJR), decided on November 13, 2008, denying the Petitioners' motion to alter or amend judgment WL 4899437 (2008)..... A-10

The published decision of the United States District Court for the Southern District of Illinos in *Loch, et al., v. Edwardsville School District No. 7* on July 15, 2008, denying Petitioners' motion for summary judgment,

and granting Respondents' motion for summary judgment, 573 F.Supp. 2d 1072... A-20

APPENDIX – cont.

The unpublished decision of the United States District Court for the Southern District of Illinois in *Loch et al., v. Edwardsville School District No. 7,* decided on June 12, 2008 denying Petitioners motion to hear additional evidence, WL 2414864..... A-51

Petitioners' Motion for Summary Judgment, Filed on February 4, 2008, Exhibit C *"Report of Findings"* by Illinois Guardianship & Advocay Commission Human Rights Authority, HRA Case # 04-070-9004..... A-62

The unpublished decision of the United States District Court for the Southern District of Illinois in *Loch et al., v. Edwardsville School District No. 7,* decided on May 18, 2007 denying Respondents' Motion to Dismiss On Eight of Petitioners' Ten Count Amended Complaint, WL 1468675..... A-72

The published 'Decision and Order" from Illinois State Board of Education (ISBE) Special Education Due Process Hearing In The Matter of Kayla L./Case No. 004400 Decided on September 12, 2005..... A-89

TABLE OF CITIED AUTHORITIES

CASES: **Page**

United States Supreme Court Cases

Allen Mack Sales & Serv., Inc. v. NLRB
522 U.S. 359 (1998)..... 27

Barnhart v. Sigmon Coal Co., Inc.
534 U.S. 438, 450 (2002)..... 26

Board of Educ. of Henrick Hudson Cent. Sch. Dist. v. Rowley
458 U.S. 176 (1982)..... *passim*

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).....27

Cedar Rapids Comm. Sch. Dist. v. Garret F.
526 U.S. 66 (1999)..... 7

Florence County Sch. Dist. Four v. Carter
510 U.S. 14 (1993).....6

Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)..... 21

Rosado v. Wyman
397 U.S. 397 (1970)..... 26

Sch. Comm. of Burlington v. Mass. Dept. of Educ. 471 U.S.359 6

United States Circuit Court of Appeals Cases

Abraham v. Hershman
701 F.2d 223, 231 (CA1 1983)..... 22

Alvin Independent Sch. Dist. v. A.D.
503 F.3d 378, 384 (CA5 2007)..... 30, 31

Board of Educ. of Cmty. Consol. Sch. Dist.21 v. ISBE, 938 F.2d 712, 715-16
(CA7 1991)..... 15

Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F., 118 F.3d
245, 252 (CA5 1997)..... 22

Dale M. ex rel. Alice M. v. Bd. of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307, 237 F.3d 813, 815
(CA7 2001)..... 25, 34

Dantran v. U.S. Dep't of Labor
171 F.3d 58, 70 (CA1 1999)..... 27

Doyle v. Arlington County Sch. Board
134 F.3d 663 (CA4 1998)..... 23

Greenland School Dist. v. Amy N.
358 F.3d 150, 162 (CA1 2004).....18

Gregory K. v. Longview Sch. Bd.
811 F.2d 1311, 1312..... 25

Heather S. v. State of Wisconsin
125 F.3d 1045, 1052 (CA7 1997).....24, 34

United States Circuit Court of Appeals Cases

Hood v. Encinitas Union Sch. Dist.
486 F.3d 1099, 1106 (CA9 2007)..... 25, 29
30

Independent Sch. Dist. No. 284 v. A.C.
253 F.3d 775, 776 (CA8 2001)..... 21, 32

J.D. v. Pawlet School District
224 F.3d 60 (CA2 2000)..... 32

Kelly v. Morganhill Unified Sch. Dist.
959 F.2d 240, WL 67857
(CA9 1992)(unpublished)..... 25

Kirkpatrick v. Lenoir County Bd. of Educ.
216 F.3d 385 (CA4 2000)..... 23

Knable v. Bexley City Sch. Dist.
238 F.3d 755, 764 (CA6 2004)..... 21

Manchester Sch. Dist. v. Crisman
306 F.3d 1, 9 (CA1 2002)..... 22

Monticello Sch. Dist. No. 25 v. George L.
102 F.3d 895, 901 (CA7 1996)..... 24

Mr. I v. Maine Sch. Administrative Dist.
No. 55 480 F.3d 1 (CA1 2007)..... 32

Murray v. Montrose County Sch. Dist.
51 F.3d 921, 927 (CA10 1995)..... 21

Muller v. Comm. on Spec. Ed. of the East Islip Union Free Sch. Dist., 145 F.3d 95, 101-02 (CA2 1998)..... 22

United States Circuit Court of Appeals Cases

Rodiriecus v. Waukegan Sch. Dist. No. 60
90 F.3d 249, 254 (CA7 1996)..... 16

School Bd. of Collier County v. K.C.,
285 F.3d 977 (CA11 2002)..... 22

Sch. Dist. of Wis. Dells v. Littlegeorge
295 F.3d 671, 675 (CA7 2002)..... 15

Springer v. Fairfax County School Bd.
134 F.3d 663 (CA4 1998)..... 23, 29

Susan N. v. Wilson School Dist.
70 F.3d 758 (CA3 1995)..... 21

Town of Burlington v. Dep't of Educ.
736 F.2d 773, 791-92 (CA1 1984)..... 21

United States v. Gilbert
136 F.3d 1451 (CA11 1998)..... 22

Union Sch. Dist. v. Smith
15 F.3d 1519, 1524 (CA9 1994)..... 25

Walker County Sch. Dist. v. Bennett,
203 F.3d 1295 (CA11 2000)..... 22

United States District Court Cases

Krista P. v. Manhattan Sch. Dist.
255 F.Supp.2d 873, 884
(N.D.Ill 2003)..... 24

United States District Court Cases

J.N. Moser Trucking v. U.S. Dep't of Labor
306 F.Supp.2d 784 (N.D. Ill.2004)..... 34, 35

Karawia & Int. Services, Inc. v. U.S. Dep't of Labor, 627 F.Supp 2d. 143 (S.D.N.Y. May 7, 2009).....34

Federal Statutes and Regulations:

20 U.S.C. § 1245(l)..... 2

Individuals with Disabilities in Education Act

20 U.S.C. § 1400 *et seq.* .....*passim*

20 U.S.C. § 1400(d)(1)(A)..... 2, 4, 21

20 U.S.C. § 1401..... 21

20 U.S.C. § 1401(9)..... 4, 7

20 U.S.C. § 1401(29)..... 4

20 U.S.C. § 1403(3)(A)(i)..... 4, 5,

20 U.S.C. § 1412(a)(1)..... 4, 6

20 U.S.C. § 1412(a)(1)(A)..... 4

Federal Statutes and Regulations – Continued

20 U.S.C. § 1412(a)(3)(A)..... 5

20 U.S.C. § 1412(a)(10)(C)(ii)..... 7, 20

20 U.S.C. § 1412(a)(10)(iii)(I)(aa)-(bb).. 12

20 U.S.C. § 1414..... 21

20 U.S.C. § 1414(a)(1)(A)..... 6

20 U.S.C. § 1414(b)(1)-(5)..... 5

20 U.S.C. § 1414(c)(1)-(5)(A)..... 5

20 U.S.C. § 1414(2)(C)..... 6

20 U.S.C. § 1415(b)(6)(A)..... 7

20 U.S.C. § 1415(f)(1)(A)..... 7

20 U.S.C. § 1415(i)(1) and (2)(A)..... 7

20 U.S.C. § 1415(i)(2)(C)(iii)..... 2, 6

20 U.S.C. § 1681 *et seq*..... 14

29 U.S.C. § 794 *et seq*..... 14

42 U.S.C. § 2000d *et seq*..... 14

42 U.S.C. § 12101 *et seq*..... 14

42 U.S.C. § 1983..... 14

Federal Administrative Procedures Act:

5 U.S.C. § 706..... 27

5 U.S.C. § 706(2)(E)..... 27

Code of Federal Regulatons:

34 C.F.R. § 300 *et seq*.....*passim*

34 C.F.R. § 300.128(a)(1)..... 6

34 C.F.R. § 300.300..... 6

34 C.F.R. § 300.403(a)..... 6, 20

34 C.F.R. § 300.8(c)(1)-(13)..... 5

State Statutes and Regulations

23 Illinois Administrative Code 226 (2001):

23 Ill. Admin. Code § 226 *et seq.* .... *passim*

23 Ill. Admin. Code § 226.160..... 5

23 Ill. Admin Code § 226.75
CH I, Subtitle A Subchapter f.. 14

Illinois School Code:

105 ILCS 5/14..... *passim*

105 ILCS 5/14-8.02 5

OTHER AUTHORITIES

Kuriloff, P.J. "*Journal of School Psychology,*" 13, 335-348 (1975)..... 17

LaDonna L. Boeckman, *Bestowing the Key to Public Education: The Effects of Judicial Determinations of the Individual with Disabilities Education Act on Disabled and Nondisabled Students,* 46 Drake L. Rev. 855, 880 (1998)..... 19

James R. Newcomer, Perry A. Zirkel "*An Analysis of Judicial Review Outcomes Special Education*" Exceptional Children Volume: 65, Issue 4 (2002)... 19

S. Rep. No. 94-455, at 50 (1975) as reprinted in 1975 U.S.C.C.A.N..... 17

121 Cong. Rec. 37413 (1975)..... 35

PETITION FOR A WRIT OF CERTIORARI

Thomas, Glenna and Kayla Loch ("the Loch's") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case. The IDEA provides requirements for eligibility and the initial decision is made by a hearing officer, subject to judicial review. In applying a "clearly erroneous" standard of review, along with the *Rowley* deference and educational benefit standard, the Seventh Circuit's judicial review of the hearing officer's determination is in conflict with four (4) other circuits.

OPINIONS BELOW

The initial opinion, herein was that of an administrative hearing officer, assigned by the Illinois State Board of Education, attached at App. A89, unreported. On appeal to the U.S. District Court for the Southern District of Illinois, the judge rendered (1) a summary judgment opinion, attached at App. A20, and reported at 573 F.Supp. 2d 1072; (2) a refusal to hear additional evidence opinion, at App. A51, unpublished WL 2414864 (2008); (3) an a opinion chiefly denying the Respondents' motion to dismiss, at App. A74, unpublished WL 1468675 (2007) and (4) an opinion denying a motion to amend, at App. A10, unpublished WL 4899437 (2008). The subsequent opinion of the three-judge panel of the court of appeals, in a non-precedential decision is attached at App. A2, and reported at 327 Fed.Appx. 647. Its decision denying the petition for a rehearing and rehearing en banc, and its opinion, issued on

August 26, 2009 is attached at App. A1, unpublished WL 1747897.

STATEMENT OF JURISDICTION

The court of appeals issued its judgment and opinion on June 19, 2009. The opinion was amended on August 26, 2009, when the Petitioners' timely petition for rehearing and rehearing en banc was denied. The jurisdiction of this Court is invoked under 28 U.S.C. § 1245(l).

STATUTORY PROVISIONS INVOLVED

20 U.S.C. 1400(d)(1)(A):
To ensure all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.

20 U.S.C. 1401(3)(A):
The term "child with a disability" means a child — (i) [meeting one of the conditions listed], (ii) who, by reason thereof, needs special education and related services.

20 U.S.C. 1415(i)(2)(C):
In any action brought under this paragraph, the court — shall (i) receive the records of the administrative proceedings; (ii) shall hear additional evidence at the request of a party; and (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

STATEMENT OF THE CASE

Petitioners' Thomas and Glenna Loch (the Lochs) are the parents of Petitioner Kayla Loch, a now-21 year old girl afflicted with Type 1 juvenile diabetes, depression, adjustment and social anxiety disorders. The Petitioners' (whom are not lawyers) brought this action under the IDEA to challenge the school district's decision that Kayla was not a child with disabilities, which resulted in a dispute over the school district's obligation to provide special education services; and to vindicate various procedural violations of the IDEA committed by Respondent and the Illinois administrative hearing officer who presided over Petitioners' administrative-level proceedings. The hearing officer determined that Kayla was not a child with disabilities, and thus, not entitled to IDEA access. While applying a "clear error" standard of review, the district court determined that neither the Respondent or the hearing officer violated the IDEA and entered summary judgment for the Respondent. The district court relied upon the *Board of Educ. v. Rowley* "due weight" deference and "educational benefit" analysis in reaching its decision. On appeal, the court of appeals affirmed the district court's decision, also utilizing the 'clear error' review standard and the aforementioned *Rowley* provisions. Petitioners' seek this Court's review because the court of appeals review standard and decision squarely conflicts with the standard of review and decisions of (4) other court of appeals, and wrongly decides an important and recurring issue involving IDEA eligibility for children with disabilities.

A. Statutory Framework

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, provides federal grants to states for assistance in the education of children with disabilities. Under the IDEA, a state participating in the grant program must ensure that "[a] free appropriate public education" (FAPE) is available to all children with disabilities residing in the state . . ." 20 U.S.C. § 1412(a)(1)(A). FAPE encompasses "special education and related services," *id.* § 1401(9), including "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability . . ." *Id.* § 1401(29).

To receive special education and related services under the IDEA, a child must qualify as a "child with a disability." 20 U.S.C. § 1400(d)(1)(A) & 1412(a)(1)(A). The Act defines disability broadly. A "child with a disability" is a child

> (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
>
> (ii) who, by reason thereof, needs special education and related services.

Id. § 1401(3)(A). The Secretary of Education has promulgated a regulation defining each of the categories of disability set forth in § 1401(3)(A)(i)(ii), *see* 34 C.F.R. Part 300. Those definitions, as far as they are relevant here, require that each of the enumerated conditions to "adversely affect [ ] a child's educational performance" in order to constitute a disability. 34 C.F.R. §§ 300.8(c)(1)(i)(2006) (c)(4)(i) (emotional disturbance), (c)(9)(ii) (other health impairments), which includes diabetes.

The IDEA places the burden of identifying children with disabilities upon each state. 20 U.S.C. § 1412(a)(3)(A). Illinois' regulations governing the provision of FAPE to children with disabilities in accordance with the IDEA are found in 23 IL Admin. Code § 226 (2001) and School Code of Illinois, 105 ILCS § 5/14-8.02. The determination of eligibility is formulated by a team ("IEP Team") consisting of the parents or guardians of the child, a representative of the school district, the child's regular and special education teachers, an individual who can interpret results of evaluations of the child, and, when appropriate, the child himself or herself. 20 U.S.C. § 1414(b)(1)-(5). The IEP Team meets to interpret the evaluation data[1] and to determine a child's eligibility. §1414(c)(1)-(5)(A).

The federal funding is conditioned upon the

---

[1] In making their determination whether the child has a disability, the IEP Team "shall draw upon information from a variety of sources, including aptitude and achievement tests, parental input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior." 23 IL Admin. Code § 226.160 (2001).

State's implementation of a policy to ensure that "all children residing in the State who are disabled, regardless of the severity of the disability, and who are in need of special education and related services are identified, located, and evalutated" by the state. 20 U.S.C. § 1412(2)(C), 1414(a)(1)(A) and (B); *see also* 34 C.F.R. § 300.128(a)(1) & note 1, 300.220 & note, 300.300 note 3. Also 20 U.S.C. 1412(a)(1); and generally *Board of Education of Henrick Hudson Central School District v. Rowley*, 458 U.S. 176 200-203.

If a state receving IDEA funding fails in its obligation to provide a free appropriate public education to a disabled child, the child's parent may enroll the child in private school and seek retroactive tuition reimbursement for the cost of the private school from the state. See *Sch. Comm. of Burlington v. Mass. Dep't of Educ.*, 471 U.S. 359, 369-70 (1985). If the state (or District) makes an appropriate education in a public facility available to the child, it need not pay for the education at a private one. 34 C.F.R. § 300.403.

One of the primary ways in which the IDEA seeks to ensure that children with disabilities receive a free appropriate education is conferring broad discretion on the district court to grant relief it deems appropriate if parents' placement is determined to be proper. 20 U.S.C. § 1415(i)(2)(C)(iii). Parents are not barred from reimbursement where a private school they choose does not meet the IDEA definition of a free appropriate public education. 20 U.S.C. § 1401(9). *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 14 (1993).

IDEA affords an array of procedural safeguards to parents and children with disabilities

that require states and localities to ensure the provisions of a FAPE. 20 U.S.C. § 1414, §1415. If parents are not satisfied with the adequacy of their child's education, they may file a complaint with the State or local educational agency "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child," 20 U.S.C. 1415(b)(6)(A), and obtain "an impartial due process hearing," 20 U.S.C. 1415(f)(1)(A). Any party may "bring a civil action" in federal district court or state court of competent jurisdiction aggreived by a decision at the final administrative stage. 20 U.S.C. 1415(i)(1) and (2)(A).

The judicial review process follows, which involves the collaborative framework and expansive system of review established by the Act. See *Cedar Rapids Comm. Sch. Dist v. Garret F.*, 526 U.S. 66, 73 (1999). These broad principles are applied to individual circumstances, since neither the statutory language of the IDEA, the regulations interpreting the IDEA, nor court cases interpreting the law specify in detail what constitutes an appropriate education.[2]

---

[2] The requirements of appropriateness were intepreted by this Court in *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). The Court held that the total package of services being furnished to Amy Rowley (who was already determined eligible and provided IDEA services) was reasonably calculated to enable her to benefit from her education. The Court concluded that "the basic floor of opportunity" provided [by IDEA] consists of access to specialized instruction and related services that are individually designed to provide educational benefits to the handicapped child."

B. Factual And Procedural Background

This case arises out of a complaint filed in accordance with the IDEA by Thomas and Glenna Loch, the parents of Kayla Loch, a child with disabilities, against the Respondents, contending that Kayla had been denied a free appropriate public education and seeking tuition reimbursement. Beginning in the 4th grade, after she was diagnosed with Type 1 juvenile diabetes, Kayla received accommodations for her disability through Section 504 of the Rehabilitation Act of 1973. App. *infra*, A94. These accommodations provided for Kayla to address hypoglycemic or hyperglycemic episodes involving her Type 1 diabetes without any restrictions, in order for her to maintain tight glucose control over her disease. Kayla was also permitted to turn in missed classroom assignments late, without penalty (*i.e.*, a reduction in the grade or scoring of the assignment). These accommodations also provided Kayla could eat or drink in the Respondents' classrooms whenever necessary, in order to address a diabetic (hypoglycemic) episode. *See* Pet. Mot. S. J., Att. C. *infra*, at A68-69.

Starting in August 2002, as Kayla began her freshman year at Edwardsville High School (EHS), the Respondents' failed to properly communicate Kayla's Section 504 accomodations to her instructors. *See id.* A53-54. As a result, Kayla did not receive the accommodations she received in elementary and middle schools. This failure caused Kayla considerable difficulties and humiliation while attempting to properly manage her diabetes and make-up work assignments at EHS. *See id.* A84-85. Complicating matters, the Respondents'

maintain a "Medical Policy" which prohibits diabetic students from admininstering insulin or measuring their blood glucose levels while in Respondents' classrooms. *See id.* Kayla was left to fend for herself in a classroom designed for the education of her non-disabled peers, without accommodations. Kayla's concerns about how she would handle "a low" blood sugar (hypoglycemic episode) were intensified in having to walk to the nurse's office, unaccompanied, in an overcrowded high school, in order to access her blood glucose meter, reach her diabetic supplies and, when necessary, inject insulin. *Id.* at A65.

By February 2003, the second semester of Kayla's freshman year, Kayla began suffering emotionally, becoming extremely withdrawn and depressed. By May 2003, Kayla had become suicidal, refusing to take her insulin. She was rushed to an emergency room and subsequently assigned a psychiatrist and social worker. In June, 2003, Kayla was diagnosed with anxiety, depression and an adjustment disorder. By the end of her freshman year, Kayla's condition had caused her to miss 76 school days, and she no longer wanted to attend EHS because of fear and humiliation. *Id* at A94; also *see* A66.

Kayla's parents filed a Human Rights Authority complaint with the Illinois Guardianship and Advocacy Commission because the school district denied the accommodations they were seeking and failed to properly administer Kayla's Section 504 program. Amend. Compl. ¶ 3; *see also* App. A63. In late August 2003, Kayla's father informed the EHS principal of Kayla's recent diagnosis, and the need for all EHS personnel working with Kayla to be notified of her Section

504 accommodations in the future. The Respondents' scheduled a meeting to discuss Kayla's 2003-2004 school year accommodations, but only three of her instructors showed up for the meeting. *See id.* On September 10, 2003, the Respondents' mailed the Loch's a revised 504 plan for Kayla. The plan was not completed on the school district's forms and failed to provide many of the accommodations the Loch's were requesting. The revised plan further denied Kayla any accommodations regarding the Respondents' "Medical Policy" and incorporated additional restrictions, all over the objections of the Loch's. The Loch's believed the School District's action were retalitory for having filed a Human Rights Authority complaint. *See* Amend. Compl. ¶ 5; App. *infra.* A76.

On November 25, 2003, the Illinois Guardianship & Advocacy Commission reported their findings. *See* App, A62. The Commission concluded that the Respondents' violated Kayla's Section 504 rights of the Rehabilitation Act of 1973. *Id.* at A71. The Illinois Guardianship & Advocacy Commission provided recommendations for the school system to implement. The Respondents' failed to implement the Commission's recommendations, *see id.*[3] Kayla's anxiety

---

[3] The HRA recommended that the District adhere to the 504 regulations, ensure that all staff members working with the student attend the annual review/reevaluation meeting, that the resulting plan be developd utilizing the District's "504 Accomodation Plan" form, that parents be provided in writing of the date and time any meetings are held where eligibility and/or accomodations are determined and make modifications to it's academic requirements as are necessary to ensure that such requirements do not discriminate.

worsened through the remainder of the 2003-2004 school year. She rebeled, would no longer attend EHS and ran away from home. Kayla missed 96 days of school as her condition deteriorated, and she failed half of her classes. Amend. Compl. ¶ 7; *See* App. A94. In June 2004, Kayla was diagnosed with a social anxiety disorder. *Id.* at A22. Her new psychiatrist and social worker recommended Kayla no longer attend EHS.

In July 2004, Kayla's parents met with the EHS principal. They advised the principal of Kayla's need for an alternative education placement. The principal insisted that Kayla's needs could be met at EHS. The Loch's objected, and informed the principal that Kayla's educational needs were not being met, and her education at EHS was inadequate. *See* App. A22-23. In the absence of any other alternatives [but EHS], the Loch's proposed that Kayla attend Lewis & Clark Community College (LCCC), where she could take dual credit courses. *Id.* LCCC does not have a policy that prohibits diabetic students from administering insulin in their classrooms, or tending to a hypoglycemic incidents while in class. The Loch's told the principal they were working with the LCCC special education coordinator, based on Kayla's special needs. The principal asked the Loch's to submit their plan for Kayla to attend LCCC in writing. Amend. Compl. ¶ 8; App. *infra* at A94-95.

On August 23, 2004, the Loch's submitted their education plan for Kayla's 2004-2005 school year. *Id.* The principal rejected the Loch's plan, and insisted that Kayla return to EHS. *See* App.

A54. The Loch's objected, and advised the Principal that EHS was an inappropriate placement, and if Kayla returned again, it would be placing her at serious risk, given Kayla's current mental health issues and past difficulties in managing her diabetes there.[4]

On September 18, 2004, the Loch's formally requested that Kayla be evaluated for special education and related services. Amend. Compl. ¶ 20. An IEP Team was formed and a follow-up meeting was convened on October 29, 2004. *See* App. A96. The school systems psychologist, nurse and social worker completed individual reports. On Janurary 18, 2005, the IEP Team met with the Loch's to inform them that Kayla did not meet the eligibility criteria for special education. *Id.* Although the IEP Team confirmed an "at risk" finding in the "School Maladjustment" domain regarding Kayla's placement at EHS, the IEP Team concluded that since she was [now] achieving at the community college, she was not eligible for any IDEA services. *See* App. A55. The IEP Team focused on Kayla's academic performance at the community college, but failed to consider she was achieving there with accommodations the school district had failed to provide. Amend. Compl. ¶ 30-39; *See* App. A98. Even though Kayla was "achieving" at LCCC, the school district refused to provide a permission letter, which was necessary

---

[4] "[P]arents who believe their disabled child's education is inappropriate are to provide reasonable notice that they plan to "reject [ ] the placement proposed by the public agency to provide a FAPE to their child, including stating their concerns and intent to enroll their child in a private school at public expense." 20 U.S.C. § 1412(a)(10)(iii)(I)(aa)-(bb).

for Kayla to continue her enrollment at LCCC. Although Kayla was doing much better and returned to the honor roll during her fall semester at LCCC, the Respondents' refused to provide the requested permission letter. *Id.* In absence of a permission letter, Kayla was notified she could no longer continue her education at LCCC, unless she officially "withdrew" (i.e., "dropped out") as an active student at EHS.

Nevertheless, without the permission letter, the Loch's were left with no other options for educating Kayla within her home school district.[5]

C. Due Process Hearing

On February 3, 2005, the Loch's filed a request for a due process hearing with the respondent's superintendent alleging that the eligibility findings by the respondent were contrary to the law, and the respondent was denying Kayla a FAPE. The school district proceeded in selecting a hearing officer and a six day administrative hearing took place over a five month period of time. Petitioners represented themselves before the IHO.

On September 12, 2005, the Impartial Hearing Officer (IHO) issued her 'decision and order' confirming the respondent's eligibility findings that Kayla "was not a child with disabilities" and as such, Kayla was not permitted access to special education and related services under the IDEA. The hearing officer concluded that

---

[5] Kayla neither "dropped out" or officially withdrew from EHS. She continued with her education at Southwestern Illinois College (SWIC) beginning in January, 2005. SWIC provided the same accomodations for Kayla as LCCC did.

Kayla's educational performance did not require specialized instruction in order for her to learn. *See* App. A101-103.[6]

Because the results of the administrative proceedings were not in accordance with the IDEA or Illinois regulations, Petitioners' filed the present action in the United States District Court for the Southern District of Illinois on January 10, 2006. Petitioners' were challenging the IHO's determination that Kayla was not a child with disabilities, and not entitled to IDEA services, (resulting in a loss of FAPE for the Loch's). The Loch's alleged that the Respondents' and IHO had violated their individual rights under the IDEA and 42 U.S.C. § 1983, and that the Respondents' actions were retalitory (towards the parents) and discriminatory towards Kayla (on the basis of her gender and disability), in violation of the American with Disabilites Act, 42 U.S.C §§ 12101 *et seq.*, Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C §§ 794 *et seq.* and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* Amend. Compl. ¶ Counts 1-10; *See* App. *infra*, at A75. In total, Petitioners alleged two procedural violations and three substantive violations of the IDEA; four substantive violations of the ADA, § 504, § 1983 and Title VI and one Title IX violation.

---

[6] Neither the IEP Team or IHO considered "educational performance" as the term is defined under 23 IL Adm. Code § 226.75 Subtitle A; Subchapter f (2001). Instead they focused on Kayla's academic performance. "[T]he [IEP] team determined that student [Kayla] should be evaluated in the areas of health, vision, hearing, social/emotional status and academic performance." See App. A-96.

D. District Court Proceedings

The Loch's sought judicial review of the 2005 HOD. On May 18, 2007, the district court chiefly denied the Respondents' motion to dismiss on all but two of the Loch's ten count complaint. *See* App. A87. The presiding judge dismissed the parent's IDEA claims "for a lack of standing." *Id.*

On January 2, 2008, the Loch's requested the district court to hear additional evidence.[7] On June 12, 2008, Judge Reagan denied the Loch's request. *See* App. A61. On July 15, 2008, after denying Petitioners' motion to hear additional evidence, the district court entered summary judgment in favor of the Respondents. The judge stated the following concerning his standard of review;

> "When, as in this case, no new evidence is submitted, the court applies a standard that is 'basically the clear-error or substantial evidence standard." (citing *Sch. Dist. of Wis. Dells v. Littlegeorge*, 295 F.3d 671, 675 (7th (Cir. 2002)). "Under this deferential review, Court independently evaluates the testimony and evidence but cannot substitute its own ideas of sound educational policy for those of the school authorities." *Id.*

---

[7] Through the course of discovery, depositions had been taken of several individuals who did not testify at the due process hearing, including Kayla's endocrinologist, two psychiatrists and social worker, (who was identified as the Loch's expert witness).

(citing *Bd. of Educ. of Cmty. Consol. Sch. Dist. 21 v. ISBE,* 938 F.2d 712, 715-16 (7th Cir. 1991) (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982).

See App. A36. The district court concluded, "[I]n sum, the Court finds no error in the HO's Decision and Order, and the District is entitled to summary judgment." *See* App. A46. "The Loch's demands were simply unreasonable." *See id.* A49. The district court determined and denied a motion to amend. *See* App. A19.

E. The Seventh Circuit's Decision

On June 19, 2009, the Seventh Circuit affirmed the district courts decision,[8] utilizing their "clear error" standard and the *Rowley* deference and educational benefit analysis. See App. A2-3. Citing its decision in *Rodiriecus v. Waukegan Sch. Dist. No. 60*, 90 F.3d 249, 254 (CA7 1996), the Seventh Circuit concluded, "no basis for school district to suspect disability where [a] student's academic performance was average." *See id.* A8. The Seventh Circuit further reiterated, "[T]he district court thus did not err in concluding that the Lochs had not met their burden of showing Kayla required special education." *See Id.* On August 26, 2009, the Seventh Circuit denied the Loch's

[8] The court of appeals also affirmed the district court's findings that the Loch's had failed to exhaust their administrative remedies, (see *id.* at A6) and that the Loch's parental rights under the IDEA transferred to Kayla in accordance with 23 IL ADC § 226.690. *See id.*

request for a re-hearing and/or hearing en banc.

REASONS FOR GRANTING THE WRIT

This case presents two important and recurring questions of federal law which the circuits are avowedly and intractably divided. In IDEA, Congress expressly provided that a "judicial review" step would be part of the multi-step process for resolving disputes and they directed courts to conduct an "independent review" when adjudicating such cases. See S. Conf. Rep. N. 94-455 p. 50 (1975). This deliberate change in the review provision was an unusually clear indication that Congress intended courts to undertake a substantive review instead of relying on the conclusions of a state agency. Congress recognized the degree of deference being accorded to the decision of school officials and hearing officers, realizing it "was asking the same professionals who had excluded handicapped children in the past to now ensure their right to an appropriate education."[9]

In its *Board of Education v. Rowley* (1982) decision, this Court addressed the question in terms of a general standard of review[10] and chose an intermediary deference option for specifically IDEA cases involving the judicial review of the appropriateness of a child's education in accordance

---

[9] Kuriloff, P.J. (1975). Law, education reform, and the school psychologist. "*Journal of School Psychology*," 13, 335-348.

[10] "Standard of review" is the legal concept which defines how much weight the judge should accord to earlier decisions in the same case.

with an IEP. Nevertheless, the resulting requisite degree of deference was not entirely clear in its scope or amount for IDEA cases not involving the appropriateness of a child's education. As a result, federal circuit courts have articulated different interpretations of the *Rowley* deference. The circuits now range from narrowly interpreting *Rowley*, in providing a virtually *de novo* review standard, to maintaining a "due weight", highly deferential — clearly erroneous standard of review.

In IDEA eligibility cases, four circuit courts believe a *de novo* standard is required, since these cases involving statutory interpretation and legal conclusions. This determination, of whether a child meets the qualifying conditions of a "child with disability", and is entitled to IDEA services involves the statutory language of the Act and the relevant state plan for the identification and evaluation of children with disabilites. In resolution of these issues, the First, Second, Fifth and Eleventh Circuits independently consider if such a failure rises to a statutory violation,[11] and review IDEA eligibility cases under a *de novo* standard of review. The First Circuit has noted that such issues require a "difficult and sensitive" analysis. See *Greenland Sch. Dist. v. Amy N.*, 358 F.3d 150, 162 (CA1 2004).

In a direct split, the Fourth, Seventh and Ninth circuits maintain a presumptive review, a presumed correctness of the administrative findings. These circuits give a high degree of deference to the hearing officers findings, even in

---

[11] This Court's decision in *Rowley* confirmed that a material failure to implement an IEP violates the IDEA.

cases involving IDEA eligibility. Using an interpretation of *Rowley* that mandates "due weight," these circuit courts only alter or overrule an administrative hearing order if the decision is considered "clearly erroneous." In a further split with the other circuits, these three court of appeals also maintain that the *Rowley* "educational benefit"[12] analysis is applicable in the determination of whether a child is eligibile for special education and related services.

Because of this 4 to 3 split among the circuits, different standards of review are being conducted — resulting in federal court outcomes being inconsistent and varied.[13] Since the IDEA provisions do not specifically clarify, significant differences have emerged within the circuit courts regarding what standard of review to apply when adjudicating IDEA eligibility cases. IDEA controversies are now a prominent source of federal court business, and have generated six Supreme Court decisions since 2005. This question recurs regularly, especially in matters where parents have elected to voluntarily effectuate a private school

---

[12] "[T]he achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit") as measures of acceptable progress," *id.* (*Rowley*, 458 U.S. at 207 n.28)

[13] See LaDonna L. Boeckman, *Bestowing the Key to Public Education: The Effects of Judicial Determinations of the Individual with Disabilities Edcuation Act on Disabled and Nondisabled Students*, 46 Drake L. Rev. 855, 880 (1998) ("The IDEA fails to set any standards or guidelines for judges to utilize when asked to intervene. The result is often a quagmire of inconsistent and inequit-able opinions.").

placement,[14] due to a denial of eligilibity and/or FAPE by the local education agency. *See* 20 U.S.C. §§ 1412(a)(10)(C)(ii) and (iii)(aa)(bb) and 34 C.F.R. § 300.403(a) (referring to placements made by parents when FAPE is not made available). Although many difficult issues with the statute's interpretation have been resolved, none remain as unsettled, as cases involving IDEA eligibility and the appropriate standard of review the courts should apply.

Because only this Court can bring the required uniformity in how IDEA eligibility claims are litigated in federal court, and because the decision below is erroneous, certiorari should be granted.

I. THE COURT OF APPEALS ARE IRRECONCILABLY DIVIDED OVER THE STANDARD OF REVIEW TO BE USED IN IDEA ELIGIBILITY CASES

This division has resulted in a well recognized 4-4-3 split. (The Third, Sixth, Eighth, and Tenth circuit courts conduct a "modified *de novo* review" when reviewing IDEA appeal cases. These circuits have generally expressed an intent to give some, but an undefined amount of deference to the hearing officer's decision, again, basing their standard on the circuit's interpretation of

---

[14] Placement decisions have dominated special education litigation. See "*An Analysis of Judicial Review Outcomes*

Special Education" by James R. Newcomer, Perry A. Zirkel, Exceptional Children, Volume: 65, Issue: 4 (2002).

Rowley.)[15] In a stricter sense, the four court of appeals conducting a *de novo* standard review the substantive IDEA eligibility criteria (*see* 20 U.S.C. § 1400(d)(1)(A)) to determine if the education agency satisfied the relevant definitions set forth in the state and federal regulations following statutorily prescribed standards. 20 U.S.C. § 1401, §1414. ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

A. Four Courts Of Appeal Apply *De Novo* Standard of Review In IDEA Eligibility Cases

The First, Second, Fifth, and Eleventh court of appeals' utilize a *de novo* standard of review when adjudicating special education eligibility cases.

As the First Circuit has recognized, the weight owed the administrative record "must be left to the discretion of the trial court," because "Congress intended courts to make bounded, independent decisions." *Town* of *Burlington v.*

---

[15] However, these courts have all maintained a *de novo* standard of review is applicable regarding conclusions of law and in reviewing IDEA summary judgment awards; see;

Susan N. v. Wilson Sch. Dist., 70 F.3d 758 (CA3 1995); *Knable ex rel. Knable v. Bexley City Sch. Dist.*, 238 F3d 755 (CA6 2001), *Independent School Dist. No.284 v. A.C.*, 258 F.3d 769 (CA8 2001); *Murray v. Montrose County Sch. Dist.*, 51 F.3d 921 (CA10 1995).

Dep't of Educ., 736 F.2d 773, 791-92 (CA1 1994). When the issue is more a matter of law, the educational expertise of the agency is not implicated ("[T]he construction of a statutory term traditionally falls within the scope of judicial review." *See Abraham v. Hershman*, 701 F.2d 223, 231 (CA1 1983), *also Manchester Sch. Dist. v. Crisman*, 306 F.3d 1, 9 (CA1 2002). "[B]ecause this case only involves questions of law – the interpretation of federal and state statutes – we review the district court's conclusion *de novo*."

The Second Circuit has stated, "the state administrative officials [are] in no better position than the district court to make conclusions with respect to [the child's] statutory eligibility based on the record." *See Muller v. Comm. on Special Educ. of the East Islip Union Free Sch. Dist.*, 145 F.3d 95, 101-02 (CA2 1998).

The Fifth Circuit applies a standard of review that has been described as "virtually *de novo.*" "[A]ccordingly, we have described the district court's § 1415(e)(2) review as "virtually de novo." *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. ex rel. Barry F.*, 118 F.3d 245, 252 (CA5 1997), *cert. denied*, — U.S. —, 118 S.Ct. 690, L.Ed.2d 636 (1998). "And, our court will 'review *de novo*, as a mixed question of law and fact, a district court's [merits-] decision . . . that an alternative placement was or was not inappropriate under the IDEA'". *Id.*

The Eleventh Circuit has maintained, "[T]o the extent this issue involves a question of law — the interpretation of a federal statute — our review is *de novo*." *See Walker County Sch. Dist. v. Bennett*, 203 F.3d at 1295 (CA11 2000) (citing *United States v. Gilbert*, 136 F.3d 1451 (CA11

1998). In *School Bd. of Collier County v. K.C.*, 285 F.3d 977 (CA11 2002) the Eleventh Circuit concluded, "[t]he district court conducts an entirely *de novo* review of the ALJ's findings, [per] *Rowley*, 458 U.S. at 205, (citations omitted), and has the discretion to determine level of deference it will give to the ALJ's findings."

B. The Fourth, Seventh & Ninth Circuits Apply A "Clearly Erroneous" Standard In IDEA Eligibility Cases

In IDEA eligibility cases, the Fourth, Seventh and Ninth circuits have rejected both the *de novo* and "modified *de novo*" standard and have held the hearing officer's determination should be adjudicated under a "clearly erroneous" standard of review. In rejecting the First Circuit's standard, the Fourth Circuit stated in *Doyle v. Arlington County School Board*, 953 F.2d 100 (CA4 1991) "that findings of fact by hearing officers . . . are entitled to a presumptive validity." The Fourth Circuit held in *Springer v. Fairfax County School Board*, 134 F.3d 663 (CA4 1998) that "[d]istrict courts are required to give deference to the state and local education authorities, whose primary duty is to administer the IDEA." The Fourth Circuit confirmed their standard of review more recently in *Kirkpatrick v. Lenior County Bd. of Educ.*, 216 F.3d 385 (CA4 2000); "[T]his circuit requires courts to give deference to the findings of the administrative hearing officer and have held that administrative findings are entitled to be *prima facie* correct."

The Seventh Circuit maintains that IDEA

eligibility determinations should be reviewed under a "clearly erroneous" standard.

> "The issues the Lochs raise are that the HO erred in determining that Kayla was not a child with a disability; and (2) erred in interpreting 34 C.F.R. § 300.7(c)(4)(i) as requiring an adverse educational effect over a long period of time. The Court gives 'due weight' to the HO's findings and reviews them under 'a standard that is more stringent than the substantial evidence standard but less than a *de novo* review." "[T]he court applies a standard that is 'basically the clear-error or substantial evidence standard'" *Krista P. v. Manhattan Sch. Dist.*, 255 F.Supp.2d 873 (N.D.Ill 2003) (citing *Heather S. v. Wisconsin*, 125 F.3d 1045, 1052 (CA7 1997). See App. A35.

The district court reviewing the Petitioners' complaint clarified; "[C]ontrary to the Plaintiffs' [the Lochs] suggestion, the Court does not review the administrative decision *de novo*." *See Monticello Sch. Dist. No. 25 v. George L.*, 102 F.3d 895, 901 (CA7 1996). See App., A57. The Seventh Circuit has directed district court judges;

> "[W]hen the district court does not take fresh evidence but instead bases his review of the hearing officer's decision on the record compiled in the administrative proceedings, he is required to give "due deference" to

> that decision. That is, the fact that he disagrees with the officer is not enough to justify setting aside the latter's order; he must be strongly convinced that the order is erroneous."

Dale M. ex rel. Alice M. v. Board of Educ. of Bradley-Bourbonnais High Sch. Dist. No. 307, 237 F.3d 813, 815 (7th Cir.2001).

The Ninth Circuit in *Hood v. Encinitas Union School Dist.*, 486 F.3d 1101 (CA9 2007) has stated; ("[W]e find that the district court's acceptance of the HO's determination that Anna was not legally entitled to receive publically funded special education was not in clear error. As a result, we affirm." The Ninth Circuit has concluded; "[T]he 'thorough and careful' findings of a hearing officer are entitled deference." *See Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (CA9 1994). The Ninth Circuit stated in *Hood*;

> "[A]lthough appellant argues for *de novo* review, the fact-intensive nature of a special education eligibility determination coupled with considerations of judicial economy render a more deferential approach appropriate."

See Hood, 486 F.3d at 1104. The Ninth Circuit employed a clear error standard to review a district court's ruling that a child was not disabled, *see Kelly v. Morgan Hill Unified Sch. Dist.*, reasoning that such a determination was primarily factual. 959 F.2d 240, 1992 WL 67857 (CA9 1992) (unpublished) (citing *Gregory K. v. Longview Sch. Dist.*, 811 F.2d at 1311, 1312 (CA9 1987) the

"question whether [a] student has a learning disability or is mentally retarded is reviewed for clear error."

II. THE DETERMINATION OF IDEA ELIGIBILITY AND WHETHER A CHILD HAS A DISABILITY REQUIRES A *De Novo* STANDARD OF REVIEW

IDEA eligibility, being a threshold question, requires a *de novo* level of judicial review. Congress outlined this requirement under a federally funded program designed to address a material problem involving children with disabilities. In *Rosado v. Wyman*, 397 U.S. 397 (1970) this Court confirmed that the state was free to reject federal money and opt out of a program, but stressed that the proper interpretation of a federal statute adopted by Congress was the overriding concern, and that was a job for the judiciary, not state administration. *Id.* at 421-22. The "clearly erroneous" standard of review does not allow the courts to undertake the substantive review Congress intended. Only the *de novo* review meets this requirement of Congress. The determination of a child's IDEA eligibility, and whether a child meets the definition of a "child with disability" is the first and most fundamental decision required under the Act. The four court of appeals conducting a *de novo* review begin with the language of the statute. This Court has instructed that their first task "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in

the case." *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002).

In IDEA cases, federal courts review the outcome of due process hearings, and "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." (see 20 U.S.C. § 1415(i)(2)). The "clearly erroneous" standard is contrary to Congress' mandate, in that it allows some erroneous factual and material determinations to stand, even if they are incorrect within the meaning of the Act or the relevant state plan — merely because of the degree in which they happen to deviate.

Under 5 U.S.C. § 706 "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action," though "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S.at 837, 844. Agency findings must be set aside if "unsupported by substantial evidence" (§ 706(2)(E); *Allen Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998). The preponderance of the evidence standard "establishes a quantum of proof to be measured by the fact finder, not a standard for error dectection." *Dantran v. U.S. Dep't of Labor*, 171 F.3d 58, 70 (CA1 1999).

Such a standard of proof, the phrase "preponderance of the evidence" would clearly suggest that a court should reevaluate the evidence *de novo* and reject the agency's findings if the court were to determine independently that those

findings were not supported by the weight of the evidence. This is precisely what the *Rowley* decision was referencing, when it clarified the following;

> "[T]he parties disagree sharply over the meaning of these provisions, petitioners contending that courts are given only limited authority to review state compliance with the Act's procedural requirements and no power to review the substance of the state program, and respondents contending that the Act requires courts to exercise *de novo* review over state educational decisions and policies. We find petitioners' contention unpersuasive, for Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts."

Bd. of Educ. v. Rowley, 458 U.S., at 205.

The four court of appeals conducting a *de novo* judicial review of special education eligibility are doing so properly.

III. CIRCUIT COURT SPLIT CAUSING INCONSISTENT AND INEQUITABLE OUTCOMES IN IDEA ELIGIBILITY CASES

A. Fourth, Seventh and Ninth Circuits Inappropriately Utilizing *Rowley* "Educational Benefit" In Determining IDEA Eligibility

Besides inappropriately utilizing the *Rowley* "due weight" deference, the Fourth, Seventh and Ninth circuits are mistakenly applying the *Rowley* educational benefit analysis in IDEA eligibility cases.[16] These circuits have compounded the definitional problem involving IDEA eligibility by using the *Rowley* case to support their constricted view of what it means to need special education on account of a disability. Amy Rowley, the deaf child in *Bd. of Educ. v. Rowley* was, of course, eligible for special education, even though she was performing well as well as or better than her peers academically. The level of services a child is entitled to once the child is declared eligible is an entirely different focus from whether the child is eligible in the first place. This misuse of *Rowley*, in IDEA cases where a child has never received an IEP or has never been found eligible for IDEA services is categorical mistake.

This inappropriate use of the *Rowley* "educational benefit" analysis undermines the intent of Congress, in that it keeps children intended to benefit from the law from receiving the law's benefits. The Fourth Circuit has held in *Springer;* "[P]rior to his eleventh grade year, Edward made steady educational progress, advancing from grade to grade on schedule. *Cf. Rowley*, 458, U.S. at 209-10 (evidence that student was advancing from grade to grade indicated educational progress)." *Springer v. Fairfax County*

---

[16] "[T]he achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit") as measures of acceptable progress," *id.* (*Rowley*, 458 U.S. at 207 n.28).

Sch. Bd., 134 F.3d 666 (CA4 1998).

In *Hood,* the Ninth Circuit conceded that *Rowley* concerned the level of services to be provided a child found eligible, not the determination of eligibility itself. Nevertheless, in utilizing the *Rowley* educational benefit analysis, the Ninth Circuit concluded; "[A]ccordingly, the district court used the correct standard of review when it considered the benefit Anna received in the regular classroom as part of its eligibility analysis." *Hood*, 486 F.3d at 1107. Similarly, the Seventh Circuit utilized the *Rowley* educational benefit analysis in determining the Petitioners' eligibility, and cited the results of the Ninth Circuit's decision in *Hood*. *See* App. A8.

By inappropriately using the educational benefit standard of *Rowley,* and cases referencing it, the Fourth, Seventh and Ninth circuits' have held a child's record of average or above average grades proves they are not eligible for special education and related services. This application of *Rowley* does not have justification under the federal statute. Further, this departure from its proper interpretation in *Rowley,* is placing "educational benefit" as an exlusionary factor for IDEA eligibility within these circuits.

The Seventh Circuit relied on the *Rowley* educational benefit analysis in deciding the Petitioners' case. ("[K]ayla's grades at Edwardsville were satisfactory, despite her diabetes and anxiety . . ."). *See* App. A8. The Seventh Circuit further held; "[W]here a student made academic progress, he did not need special education. *See e.g., Alvin Ind. Sch. Dist. v. A.D.*, 503 F.3d 378, 384 (5th Cir. 2007)." See *Id.*

In *Alvin Independent School District v. A.D.*,

the school district appealed the hearing officer's determination that A.D. (who was diagnosed with an attention-deficit hyperactivity disorder (ADHD)) met the eligibility criteria and was eligible for special education. In conducting their virtally *de novo* review, the Fifth Circuit[17] independently evaluated the central issue; by reason of his ADHD, did *A.D.* need special education and related services.

> "[C]ontrary to A.D.'s assertion, the district court did not base its holdings upon 'benefit from regular education' standard. Under this standard, the district court would have focused exclusively on A.D.'s passing grades and TAKS scores. Rather, the district court also considered 'a variety of sources, including apititude and achievement tests, parent input, and teacher's recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior . . .' '34 C.F.R. § 300.306(c)(1)(i) (outlining procedures for determining 'eligibility and educational need')."

The Fifth Circuit reviewed *Alvin* with the proper level of judicial scrunity, and the *Rowley* educational benefit analysis was not applicable in determining *A.D.'s* eligibility.

This "reverse-engineering" of *Rowley's*

---

[17] 503 F.3d 378, 384 (5th Cir. 2007).

educational benefit standard, into the judicial review of whether a child qualifies for special education is not justified under the *Rowley* precedent, and is not occuring within the other circuits. See *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60 (CA2 2000) and *Independent Sch. Dist. No. 284 v. A.C.*, 253 F.3d 775, 776 (CA8 2001). This incorrect application of *Rowley* inappropriately reduces the number of children covered by the statute in unbridgeable ways. The four (4) courts of appeals who conduct a *de novo* review in IDEA eligibility cases are applying the proper standard.

IV. NEITHER THE DECISION BELOW, NOR THE STANDARD OF REVIEW APPLIED BY THE FOURTH, SEVENTH, AND NINTH CIRCUITS CAN BE RECONCILED WITH A PLAIN READING OF THE IDEA's STATUTORY TEXT

In applying the proper standard of review in an IDEA eligibility case, the First Circuit focused on the federal eligibility provisions and state law definitions in making its decision. In *Mr. I v. Maine School Administrative District No. 55*, the First Circuit court of appeals held that a child with Asperger's Syndrome and depression was a child with a disability under the IDEA.[18] Disagreeing with the HO's eligibility findings, the district court reversed the decision. *Id.* at 9. The district court ruled that the school district and hearing officer erred by focusing on whether the girl's disability

[18] 480 F.3d 1 (1st Cir. 2007).

adversely affected "academic" skills. The First Circuit affirmed the ruling that the child was eligible, stating the child's disabilities met the list of conditions in the statute, leaving in dispute the adverse effect on educational performance and the need for special education by reason of the condition. The First Circuit observed that the State law defined educational performance broadly, to include areas beyond traditional academic areas, and Maine's definition included social skills and social communications. The First Circuit rejected the hearing officer's conclusion that "a child without 'academic needs' is per se ineligible for IDEA benefits, especially when the state has conditioned eligibility on a standard that explicitly takes 'non-academic areas' into account." It buttressed its decision with reference to the broad purposes of the IDEA to prepare children with disabilities for independence and meet children's social as well as academic needs. *Id.* at 12-13. The court also pointed out that the requirement of "adversely affects educational performance" in the federal regulations includes any adverse effect, even if slight.

Significantly, however, the Petitioners' appeal does not reside in the First Circuit, where their appeal would not have been reviewed under such a narrow framework and "clear error" standard. Nor does their appeal reside in the Second, Fifth Circuits or Eleventh circuits, where their appeal would have been independently reviewed under a *de novo* standard of review, without the district court being constrained by the hearing officer's decision. Petitioners' appeal lies in the Seventh Circuit, which has rejected the First, Second, Fifth and Eleventh Circuits approach, as

well as the four (4) circuit courts conducting a "modified *de novo*" review, and imposed an absolute "clear error" standard in the judicial review of IDEA eligibility cases. This standard of review within the Fourth, Seventh and Ninth court of appeals goes well beyond the more nuanced approach of the other circuit courts.

In the Seventh Circuit, a district court is constrained to give "due weight" to the HO's decision, and must apply the "clearly erroneous" standard. *See Karawia & International Services, Inc. v. U.S. Dept. of Labor*, 627 F.Supp 2d. 143 (S.D.N.Y. May 7, 2009) ("Because the Seventh Circuit has held that 'clear error' review applies to judicial review of administrative decisions under IDEA, the district court in *J.N. Moser* concluded that it was 'constrained to apply the clearly erroneous standard . . .'"

> "This Court does not of course write on a clean slate. It is not free, for example, to apply a stricter standard of review akin to the "modified *de novo*" standard described by other Courts of Appeals. Even though the Seventh Circuit had never had occasion to construe Section 39 directly, the IDEA review provision is so similar in language (with no readily apparent basis for distinction) that this Court is constrained to apply the clearly erroneous standard expounded in *Dale M.* (see also *Heather S. by Kathy S. v. Wis.*, 125 F.3d 1045, 1053 (7th Cir.1997). In sum, then the agency's factual findings must be upheld unless this Court is strongly convinced that they were wrong.

J.N. Moser Trucking v. U.S. Dept. of Labor, 306 F.Supp. 2d 784 (N.D.Ill.2004).

Recognizing that educational policy and practice are traditional State and local functions, in enacting the IDEA, Congress did not prescribe any substantive standards of education, instead seeking only "to open the door of public education to handicapped children on appropriate terms." *Id.* at 192. As Senator Harrison Williams, the IDEA's principal drafter stated, "[t]his measure fulfills the promise of the Constitution that . . . handicapped children no longer be left out." 121 Cong. Rec. 37,413 (1975). Sadly, some children continue to be left out, as long as the reach of the schoolhouse extends into the courthouse.

V. THIS CASE IS APPROPRIATE VEHICLE FOR DECIDING THE QUESTIONS PRESENTED

A. The Issues Presented Were Squarely Decided Below; There Are No Impediments To This Court Granting Petitioners' The Relief They Seek, And The Circuit Split Over The Issue Is Now Mature And Ripe For This Court's Review

This case presents an appropriate vehicle to resolve the questions presented. These issues were squarely presented and resolved below; indeed, it is the only issues decided in the order that would be the subject of this Court's review, because of their

exceptional importance. Moreover, Petitioners' would manifestly benefit from a ruling in their favor, in as much as it would allow them an equal due process review and avoid a summary judgment determination — based solely on an inappropriate standard of review and misapplied educational analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

November 24, 2009

s/Thomas, Glenna & Kayla Loch ("the Loch's)
5 Goldenrod Lane
Edwardsville, Illinois 62025
(618) 656-1908 (Home)
(314) 952-3960 (Cell)
goshenpatriots@msn.com

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 26, 2009

Before

FRANK H. EASTERBROOK, *Chief Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

No. 08-3073

THOMAS LOCH, GLENNA LOCH &
KAYLA N. LOCH

Plaintiffs-Appellants,

v.

BOARD OF EDUCATION OF
EDWARDSVILLE COMMUNITY
SCHOOL DISTRICT 7,

Defendant-Appellee

ORDER

On consideration of the petition for rehearing and rehearing en banc, filed by plaintiffs-appellants on July 6, 2009, no judge in regular active service has requested a vote on the petition for rehearing en banc, and all members of the original panel have voted to DENY the petition for rehearing,

Accordingly, the petition for rehearing is DENIED.

NONPRECEDENTIAL DISPOSITION

To be cited in accordance with

Fed. R. App. P. 32.1

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Submitted May 27, 20091

Decided June 19, 2009

Before

FRANK H. EASTERBROOK, *Chief Judge*

ANN CLAIRE WILLIAMS, *Circuit Judge*

JOHN DANIEL TINDER, *Circuit Judge*

ORDER

Thomas and Glenna Loch and their daughter Kayla, a public school student with diabetes, brought suit alleging that Edwardsville School District No. 7 denied Kayla an appropriate public education suited to her disability and otherwise violated the

---

[1] After examining the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. See FED. R. APP. P. 34(a)(2)

Individual with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1401 *et seq*, the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq*, Section 504 of the Rehabilitation Act of 1973, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. The district court dismissed some of the Lochs' claims and granted summary judgment to the school district on the others. The Lochs appeal and we affirm.

Kayla's health problems began when she was diagnosed with type 1 diabetes at the age of ten. The district and the Lochs developed a so-called 504 plan, which addressed her diabetes by requiring teachers to give her additional time to complete assignments when she missed class and permitting her to eat or test her blood sugar in class when necessary. Before Kayla began Edwardsville High School about four years later, her doctor also diagnosed her with "adjustment disorder—mixed anxiety and depression" and, one year after that, social anxiety disorder. But the Lochs sought no change to Kayla's 504 plan to address the new diagnoses, and she performed well during her freshman year, although she began to regularly miss class. During the spring of Kayla's sophomore year in 2004, she stopped attending classes altogether. Without clearing the arrangement with the high school or the school district's administrators, she enrolled at Lewis & Clark Community College. Meanwhile, Kayla failed most of her classes at the high school, and at the semester's close, Edwardsville dropped her enrollment.

Over the summer of 2004, the Lochs met with Edwardsville's principal to suggest that he allow

Kayla to take all of her classes at the community college while remaining registered at the high school and receiving credit toward graduation from the high school. The principal explained that, although school board guidelines did not permit this type of arrangement, he could work with the Lochs to create an alternative plan for Kayla so that she could continue her studies at Edwardsville.

The Lochs, unhappy with this response, requested an evaluation under the IDEA to assess whether Kayla was eligible for a special education plan like the one they had proposed. A team of school officials conducted a number of tests and interviewed Kayla's physicians to determine whether there was a medical cause for her absenteeism. Kayla's pediatric endocrinologist reported that her diabetes, properly controlled, was not a reason for absenteeism. Kayla's psychiatrist, whom she had not seen in six months, noted that she was not on any medication for anxiety and that, at her last appointment, she had even denied experiencing further symptoms. Kayla's therapist, whom she had also not seen in six months, noted only that Kayla was happier at the community college. Finally, Thomas and Glenna told the team that Kayla had encountered occasional problems with new teachers or substitutes who were unfamiliar with her medical conditions and that she did not like attending the high school because of conflicts with her peers. But Thomas and Glenna also acknowledged that Kayla's health problems had not interfered with her semester at the community college, where she had earned three As and one B. Based on these interviews, the team of school officials ultimately concluded that Kayla was not eligible for special education: although they observed

that she was "at risk" in the category of "school maladjustment" her intellectual and psychological functioning were normal and required no special plan.

The Lochs requested a hearing to challenge this conclusion, obtain their desired special education plan, and receive reimbursement for their tuition expenses at the community college. The hearing officer upheld the district's determination that Kayla was ineligible for further special education and concluded that the district had not violated the Lochs' procedural rights under the IDEA. She also denied the Lochs reimbursement for Kayla's community college tuition.

The Lochs then turned to federal district court. There, the court dismissed for lack of standing Thomas and Glenna's claims under the IDEA because Kayla was 18 years old when they filed suit. The court next dismissed Kayla's claims under the ADA and section 504 of the Rehabilitation Act of 1973, as well as her parents' claims under section 504, the ADA, Title VI, and Title IX, because the Lochs had not presented them to the hearing officer as they were required to do because relief for those claims was also available under the IDEA. Finally, the court granted summary judgment for the district on Kayla's Title IX and IDEA claims, holding that Kayla was not covered by the IDEA because she was not disabled, that the district had procedurally complied with the IDEA, and that the Lochs were not entitled to reimbursement for Kayla's community college tuition. The Lochs moved for reconsideration, arguing that their claims should have survived dismissal and summary judgment, but the court denied that motion.

On appeal, the Lochs contest the district court's grant of summary judgment for the district as well as the court's dismissal of some claims and its ruling on their motion for reconsideration. We begin with the court's dismissal rulings, which we review de novo. *Rujawitz v. Martin*, 561 F.3d 685, 688 (7th Cir. 2009). The Lochs first challenge the district court's order dismissing for lack of standing Thomas and Glenna's claims under the IDEA. The Lochs are correct that parents have individual enforceable rights under the IDEA, *see Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 526 (2007), but under Illinois law those rights are transferred to the student when that student reaches majority, *see* 20 U.S.C. § 1415(m)(1) (allowing states to transfer parental rights to student who has reached majority and has not been found incompetent); 23 IL ADC § 226.690 (transferring rights). Kayla was eighteen when the Lochs filed this action and so she alone can assert claims under the IDEA.

The Lochs next quarrel with the district court's conclusion that the parents failed to exhaust through the administrative process of the IDEA the claims that they now seek to litigate under the ADA, § 504, and Title IX. Although the Lochs concede that we ordinarily require exhaustion of such claims, see Charlie F. v. Bd. of Ed. of Skokie Sch. Dist. 68, 98 F.3d 989 (7th Cir. 1996), they maintain that an exception to the exhaustion requirement applies here because, they say, exhaustion would have been futile, *see McCormick v. Wuagekon* (CA7 Cir. 2004). The Lochs misunderstand the scope of the exception, however: it applies only when the plaintiff seeks compensation for grievances that the IDEA does not

redress, such as physical injuries. *See id.* at 568-69. Here, the Lochs have identified only injuries for which relief is available under the IDEA: a revised plan of special education and tuition reimbursement. *See* 20 U.S.C. § 1412(a). Accordingly, they were required to exhaust their claims and the district court was right to dismiss them.

The Lochs next argue that the district court erred in granting summary judgment on Kayla's claims under the IDEA. Our standard of review of grants of summary judgment in cases under the IDEA differs from the one we typically employ in evaluating a district court's grant of summary judgment. *Patricia B. v. Bd. of Ed. of Oak Park*, 203 F.3d 462, 466 (7th Cir. 2000). When no new evidence is presented to the district court in an IDEA suit, as was the case here, "the motion for summary judgment is simply the procedural vehicle for asking the judge to decide the case on the basis of the administrative record." *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1052 (7th Cir. 1997). Thus, even though it is termed "summary judgment," the district court's decision is based on the preponderance of the evidence, and we reverse only if the court's findings were clearly erroneous. *Id.*

The Lochs challenge the district court's conclusion that Kayla's medical condition is not covered by the IDEA. The IDEA defines "child with a disability" as a child who suffers from a health impairment and who, because of the health impairment, "needs special education and related services." 20 U.S.C. § 1401(3); *see also* 34 C.F.R. § 300.8(c) (health impairments covered by IDEA include diabetes and "emotional disturbances"). The

Lochs believe that Kayla suffered from anxiety about attending class at Edwardsville High School and that her grades "were on a downward spiral." This, they say, is enough to meet their burden of proving that Kayla needed special education. *See Heather S.*, 125 F.3d at 1052 (party challenging outcome of administrative proceeding bears burden of proof). But Kayla's grades at Edwardsville were satisfactory, despite her diabetes and anxiety, until she stopped attending class in the spring of 2004. And the Lochs have not produced medical evidence that Kayla stopped attending school because her anxiety or diabetes had worsened. Indeed, Kayla's doctors reported that when she was not attending classes, her health was good and should not have interfered with school attendance. Finally, the Lochs offer no medical basis for her better attendance and performance at the community college.

See, e.g., Alvin Ind. Sch. Dist. v. A.D., 503 F.3d 378, 384 (5th Cir. 2007) (where student made academic progress, he did not need special education); *Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099, 1106-09 (9th Cir. 2007) (student's ability to perform at or above grade level precluded finding that she needed special education); *Rodiriecus v. Waukegan Sch. Dist. No. 60*, 90 F.3d 249, 254 (7th Cir. 1996) (no basis for school to suspect disability where student's academic performance was average). The district court thus did not err in concluding that the Lochs had not met their burden of showing Kayla required special education.

The Lochs also argue that even though their decision to enroll Kayla at the community college

was their own, they were entitled to reimbursement from the district for Kayla's tuition anyway. Their chief contention is that the district failed to comply with the IDEA's procedural requirement of providing them with adequate notice before dropping Kayla's enrollment from Edwardsville. A school district's failure to comply with IDEA procedures can exempt parents from cooperating with the school to develop an alternate education plan, *see Patricia P.*, 203 F.3d at 468, but the Lochs have not shown that the district failed to comply. The record shows that the district sent letters and made phone calls informing the Lochs that Kayla was required to return to school if they wished to keep her enrolled at the high school. The district court did not err in concluding that the Lochs had not shown the type of procedural infirmity that would allow them to seek reimbursement for their unilateral placement of Kayla at the community college.

Finally, the Lochs argue that the district court should have granted their motion for reconsideration. But because we have concluded that the court properly granted summary judgment for the district, this argument presents nothing more for us to review.

We have carefully considered the remaining contentions that the Lochs have made, but they do not warrant further discussion.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
Filed 11/13/2008

THOMAS H. LOCH, GLENNA H. LOCH and KAYLA N. LOCH,	)
	)
Plaintiffs,	)
	)
v.	) **Case No.**
	)**06-CV-0017**
	)**MJR**
	)
BOARD OF EDUCATION OF EDWARDSVILLE COMMUNITY SCHOOL DISTRICT #7,	)
	)
Defendant.	)

MEMORANDUM AND ORDER

REAGAN, District Judge:

Plaintiffs Thomas, Glenna and Kayla Loch ("the Lochs") move the Court to alter or amend the judgment entered in this action in accordance with FED. R. Civ. P. 7(b)(1), 59(e) and 60(b). (Doc. 198). The Lochs assert that the Court erred in making the following findings: (1) that the Lochs failed to exhaust administrative remedies; (2) that the Hearing Officer ("HO") did not err with regard to substantive and procedural Individuals with Disabilities Education Act ("IDEA") claims; (3) that the District made every effort to follow Kayla's 504

plan; (4) that the Lochs were subjected to unfair surprise and prejudice; and (5) that the Lochs cannot establish a prima facie case of gender discrimination.

Federal Rule of Civil Procedure 59(e) governs the Lochs's motion to alter or amend judgment.[2] A District Court may alter or amend a judgment under Rule 59(e) only "when there is newly discovered evidence or there has been a manifest error of law or fact." ***Harrington v. City of Chicago,*** **433 F.3d 542, 546 (7th Cir. 2006).** ***Accord Publishers Resource, Inc. v. Walker-Davis Publications, Inc.,*** **762 F.2d 557, 561 (7th Cir. 1985)(Rule 59(e) motions serve a limited function: "to correct manifest errors of law or fact or to present newly discovered evidence.").**

Although Rule 59 relief is appropriate if the movant "presents newly discovered evidence that was not available at the time of trial or ... points to evidence in the record that clearly establishes a manifest error of law or fact," such relief is not properly awarded based on arguments or theories that could have been proffered before the district court rendered judgment. ***County of McHenry v.***

---

[2] "A motion to alter or amend a judgment is deemed filed under Rule 59(e) of the civil rules, which tolls the time for filing an appeal from the judgment, if the motion is filed within 10 days after entry of the judgment, which means after the Rule 58 judgment has been docketed." ***Borrero v. City of Chicago,*** **456 F.3d 698, 699 (7th Cir. 2006).** The ten days are computed in accord with Rule 6(e), to exclude weekends and legal holidays. The Loch's motion to alter or amend judgment was filed within ten days following entry of judgment, so it was timely filed under Rule 59(e).

***Insurance Co. of the West*, 438 F.3d 813, 819 (7th Cir. 2006) (citing *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263 (7th Cir. 1995).**

The Seventh Circuit has emphasized that Rule 59(e) may not be used to relitigate issues already argued or to present new arguments that *could have been presented* before judgment was entered. ***See, e.g., Caisse Nationale de Credit Agricole v. CBI Industries, Inc.*, 90 F.3d 1264, 1270 (7th Cir. 1996); *Bally Export Corp. v. Balicar LtiL*, 804 F.2d 398, 404 (7th Cir. 1986); *Publishers*, 762 F.2d at 561.**

> As recently reiterated by the Court of Appeals:
>
> > Motions to alter or amend judgments are no place to start giving evidence that could have been presented earlier.... ("Unlike the Emperor Nero, litigants cannot fiddle as Rome burns."). Litigation must sometime come to an end, and the limit on Rule 59 motions advances that goal.

***Eal Pozzo v. Basic Machinery Co., Inc.*, 463 F.3d 609, 615 (7th Cir. 2006).** Nor can a party use Rule 59(e) "to undo its own procedural failures." ***Harrington*, 433 F.3d at 546 (citing *Bordelon v. Chicago School Reform Bd. of Trustees*, 233 F.3d 524, 529 (7th Cir. 2000).**

The Lochs also cite to Rule 60(b), which authorizes a district court to relieve a party from a judgment for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2)

newly discovered evidence which by due diligence could not have been discovered sooner; (3) fraud; (4) a void judgment; (5) a judgment which has been satisfied or discharged; and (6) any other reason justifying relief from operation of the judgment. **FED. R. Civ. P. 60(b).**

Rule 60(b) is not a method for correcting simple legal errors but, instead allows courts to overturn decisions where "special circumstances justify an extraordinary remedy." ***Cash v. Illinois Div. of Mental Health,* 209 F.3d 695, 698 (7th Cir. 2000).** The Seventh Circuit has emphasized that Rule 60(b) imposes an "exacting standard," and Rule 60(b) movants must demonstrate exceptional circumstances to prevail. ***Romo v. Gulf Stream Coach, Inc.*, 250 F.3d 1119, 1121 n.3 (7th Cir. 2001).** Additionally, the Seventh Circuit has explained that the ground for setting aside a judgment under Rule 60(b) must be something that could not have been presented in a direct appeal. ***Bell v. Eastman Kodak Co.*, 214 F.3d 798, 801 (7th Cir. 2000).**

In support of their motion to alter or amend judgment here, the Lochs either rehash arguments already presented to (and rejected by) OR assert facts which could have been (but were not) raised before the Court entered judgment. The Lochs have neither presented newly discovered evidence nor demonstrated a manifest error of law or fact. They have demonstrated – and the record reveals – no basis warranting relief under either Rule 59(b) or Rule 60(b). Nonetheless, with the above-stated principles in mind, the Court will address each of the Lochs's allegations in turn.

Exhaustion of remedies

The Lochs contend that the Court erred in finding that they failed to exhaust administrative remedies. They argue that they "never raised or took issue with the District's medical and psychological evaluations and other assessment related tools utilized by the District to evaluate Kayla." To the contrary, in Count One, Kayla specifically alleged that the District's "evaluation process was largely inadequate, nor was it a complete and objective evaluation. Order, p. 9; Amended Complaint, p. 27. Kayla claimed, "The District's 'school team' who evaluated [her] did so in a haphazard manner and erred in their determination that [she] was ineligible for special education and related services." *Id.* As a result of these claims, the sufficiency of the District's evaluation was at issue in this proceeding. It was not, however, among the issues before the HO at the due process hearing, where Thomas Loch disagreed with the team's conclusions rather than with the sufficiency of the evaluation process.

The Lochs also contend that the Court erred in finding that merely requesting and attending an IDEA due process hearing was insufficient to exhaust claims under § 504, the ADA and § 1983. As the Court stated in its July 15th Order, although "the IDEA does not limit relief available under other laws[,] nonetheless, parties must exhaust their claims "to the same extent as would be required had the action been brought under this subchapter." ***Charlie F. by Neil F. v. Bd. of Educ. of Skokie School Dist. 68,* 98 F.3d 989, 991 (7th Cir. 1996)(citing 20 U.S.C. § 1415(f).** On this basis, the Court dismissed Thomas's and Glenna's claims of discrimination and retaliation, which

were not included in the issues raised before the HO and, thus, were unexhausted. Furthermore, the Court found that, while educational opportunities expense is available under the IDEA, the Lochs could not avoid IDEA requirements and remedies by seeking damages under different statutes but based upon the same facts. *See id.*

As to this issue, the Lochs have failed to establish a manifest error of law or fact, and have offered only rehashed arguments that were previously rejected by the Court.

Finding no error in HO's decision

The Lochs assert that the Court committed "unequivocal legal error" in finding no error in the HO's decision that Kayla is not "a child with a disability." They contend that "the District failed to identify the nature and severity of Kayla's suspected disabilities and failed to provide Kayla FAPE [free appropriate public education] in a least restrictive environment, consistent with the IDEA procedural safeguards." The Lochs cite no compelling evidence that the Court's findings were a "manifest error of law or fact."

The Lochs's arguments were thoroughly and carefully considered by the Court in its July 15th Memorandum and Order. Because the Court ruled that no new evidence could be submitted, it applied a clear error or substantial evidence standard. ***Krista P. v. Manhattan School Dist.*, 255 F.Supp.2d 873, 884 (N.D.I11. 2003).** Reviewing the HO's decision under this deferential standard, the Court concluded that the HO properly found that Kayla is not a "child with a disability." The Court found that, even though Kayla was being treated for diabetes and had been

treated at times for emotional problems, there was no proof that these conditions affected her educational performance to the extent that she required special services and programs. **Order, pp. 13-14 (citing 34 C.F.R. § 300.7(c)(9).** In so finding, the Court relied upon opinions expressed by Kayla's pediatric endocrinologist, the school psychologist and the director of special education as well as Kayla's grades during the time that she attended Edwardsville High School ("EHS").

The Lochs attempt to relitigate issues previously addressed by the Court. They also refer to and attempt to introduce into the record declarations and deposition testimony that were not part of the administrative record. This information may not be considered by the Court in determining whether Kayla is "a child with a disability." The Court finds no reason to reconsider its earlier determination that the HO committed no error in her decision.

Kayla's 504 plan and Individualized Education Program ("IEP")

While not completely clear, it appears that the Lochs contend that the Court erred in its findings as to Kayla's 504 plan because the District failed to offer Kayla special education services and did not provide her with the requested IEP.

As thoroughly considered in the Court's July 15th Order - and more briefly herein - the District was not required to offer Kayla special education services because she did not meet the statutory criteria for "a child with a disability," such that the District was required to provide her with special education services. As to the requested IEP, the

Lochs complain that the director of special education stated in her deposition that the District would not provide Kayla with the 504 plan accommodations that they were seeking. Although the Lochs formulated Kayla's IEP for her freshman year at EHS, the District is not required to provide the Lochs with the accommodations of their choice. Rather, the District must provide them with the opportunity to participate in the formulation of Kayla's IEP. ***Board of Educ. of Tp. High School Dist. No. 211 v. Michael R.,*** **2005 WL 2008919, 9 (N.D.Ill. 2005) ("School districts are responsible for ensuring that parents are afforded an opportunity to participate at each IEP meeting")(citing 34 C.F.R. § 300.345(a)).** The evidence is that the Lochs were provided with this opportunity and participated in the formulation of Kayla's IEP. The Court finds no factual or legal errors such that it should reconsider its decision as to Kayla's 504 plan and IEP.

Unfair surprise and prejudice

The Lochs contend that the Court relied upon evidence outside the record that was submitted by the District while denying them the opportunity to submit additional evidence.

First, if the District relied upon evidence not properly admitted, the time for the Lochs to raise that objection was in their response to the District's motion for summary judgment and not after judgment has been rendered. Second, while the parties were precluded from presenting evidence and testimony outside the administrative record in support of arguments related to alleged IDEA

violations, they were not precluded from submitting such evidence in support of, or in defense of, other claims, including those related to § 504, the ADA, Title VI and Title IX.

Third, to the extent that the Court considered any evidence outside the administrative record, the error was harmless and, as such, does not warrant alteration or amendment of judgment. The Lochs's claims lack specificity as to what evidence was improperly considered by the Court. However, upon review, the Court observes that, while Kayla did not testify at the administrative hearing, the Court did cite to her deposition as related to IDEA claims. In particular, the Court considered Kayla's testimony as to the difficulties she allegedly encountered with EHS staff related to her diabetes. The evidence was submitted by the Lochs and accepted by the Court as true. The District offered no evidence to counter these claims. It is patently clear that the consideration of this additional evidence, Kayla's own testimony submitted to the Court by the Lochs, cannot form a basis for reconsideration of the Court's order and judgment. The Court finds no unfair surprise or prejudice to the Lochs and will deny their motion for reconsideration as to this issue.

Gender discrimination

The Lochs claim that they were not allowed to submit additional evidence on this issue which prevented them from offering evidence of sex discrimination.

It seems that the Lochs did not understand that the Court's order barring supplementation of the record applied only to IDEA claims and did not

apply to Kayla's Title IX claim. Despite this apparent misunderstanding, the Lochs did, in fact, submit additional evidence outside the record on non-IDEA claims, including their claim for gender discrimination. In the Lochs's motion for summary judgment, they submitted six binders of deposition transcripts from District employees and from Kayla's treating physicians and counselors. Moreover, the Court reviewed the evidence submitted by the Lochs on gender discrimination, including their references to approved alternative education programs offered by the District and the male/female percentages in the various programs. If the Lochs failed to present other evidence or to make other arguments in support of their claim, it was not because the Court precluded them from doing so.

Conclusion

For all of the above reasons, the Court **DENIES** the Lochs's motion to alter or amend judgment (Doc. 198). As a housekeeping measure, the Court also **DENIES as moot** the District's motion to strike declarations (Doc. 206).

IT IS SO ORDERED.

DATED this 13th day of November, 2008

s/Michael J. Reagan
MICHAEL J. REAGAN United States District Judge

IN THE UNITED STATED DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

Filed 7/15/2008

THOMAS H. LOCH, GLENNA H. LOCH and KAYLA N. LOCH	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 06-CV-0017-MJR**
BOARD OF EDUCATION OF EDWARDSVILLE COMMUNITY SCHOOL DISTRICT #7,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

REAGAN, District Judge:

I. Background and Procedural History

Plaintiffs, Thomas, Glenna and Kayla Loch[3], filed suit against Defendant, Board of Education of Edwardsville Community Unit School District No. 7 ("the District), asserting claims against the District arising under the Individual with Disabilities Education Act ("IDEA"), 20 U.S.C. §§

[3] To avoid confusion, where appropriate the Court will refer to Plaintiffs, individually, as Thomas, Glenna or Kayla, or collectively, as "the Lochs."

1400 et seq., 42 U.S.C. § 1983, the American with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, et seq., Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. §§ 794 et seq., the Civil Rights Restoration Act of 1987 ("CRRA"), Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d, et seq., and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq. The action proceeds on the Loch's amended complaint, filed November 8, 2006 (Doc. 44).

The Lochs appeal the decision of Impartial Hearing Officer ("HO") Gail Friedman who, after a six-day due process hearing, found entirely in favor of the District. Specifically, the HO found as follows: (1) the District appropriately found that Kayla was ineligible for special education and related services; (2) the District did not violate the parents' procedural rights under the IDEA and Illinois law as it provided adequate prior written notice under 34 C.F.R. 300.503 and 23 Ill. Adm. Code § 226.160(d); and (3) Kayla's parents, Thomas and Glenna, were not entitled to reimbursement for Kayla's unilateral placement at the community college.

Kayla alleges that the District, *inter alia*, failed to evaluate her in a timely manner, refused to honor dual credit courses and discriminated against her on the basis of sex. Thomas and Glenna allege that the District violated the procedural requirements of the IDEA, retaliated and discriminated against them for having filed a complaint with the Human Rights Authority; and deprived Kayla of a free appropriate public education ("FAPE").[4]

---

[4] On May 18, 2007, the Court dismissed Count VII, Glenna's §

Kayla was diagnosed with Diabetes Mellitus (Type 1, insulin dependent) in 1997 when she was ten years old. In June, 2003, Kayla was diagnosed with "adjustment disorder - mixed anxiety and depression," and, in June, 2004, she was diagnosed with "social anxiety disorder." After Kayla was diagnosed with diabetes, the school district developed a plan for accommodating her disability under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 commonly known as a "504 plan").

Although Kayla began to miss school regularly, she maintained good grades, and teachers continued to rate her social development well. Her attendance record eroded further in eighth and ninth grades and in the first semester of tenth grade, but she still kept up with her work and performed well.

Beginning in March, 2004, during the second semester of her sophomore year, Kayla stopped attending classes at Edwardsville High School ("EHS") and began to attend Lewis and Clark Community College ("LCCC"). This step was taken without consultation or prearrangement with EHS or District administrators. Because Kayla stopped attending classes and completing her work, she failed most of her classes that semester, and her enrollment was dropped.

In July, 2004, the Lochs met with the EHS principal and proposed allowing Kayla to take all of her classes for the following academic year at LCCC. They proposed that Kayla remain registered

---

1983 claim, and Count X, Thomas's § 1983 claim. The Court also dismissed Kayla's claim of sex discrimination (Count III) under Title VI and the ADA but allowed her to proceed under Title IX. *See* Doc. 72.

at EHS and receive credit toward graduation from EHS. The principal responded that school board guidelines did not allow such an arrangement but that he and the assistant superintendent for curriculum would work with the Lochs to devise an appropriate plan for Kayla's continued education at EHS.

Thomas then requested an evaluation under the IDEA to determine whether Kayla was eligible for special education. After conducting a series of tests and meeting with Kayla's therapist, psychiatrist and pediatric endocrinologist, school officials concluded that Kayla's intellectual and psychological functioning were well within the normal category but that she was "at risk" in the "School Maladjustment" domain. In sum, school officials found that Kayla was not in need of special education services.

The Lochs were dissatisfied with this result and ultimately submitted a request for a due process hearing. As outlined above, the HO found in favor of the District, and there was no change in Kayla's status or her eligibility for special education. Because the Lochs could not obtain the accommodations that they sought, they filed the instant action against the District. Before the Court are the parties' cross-motions for summary judgment (Docs. 161, 163).

II. Applicable Legal Standard

Summary judgment is proper if the pleadings, depositions, interrogatory answers, admissions and affidavits reveal that there is no genuine issue as to any material fact *and* that the moving party is entitled to judgment as a matter of

law. ***Vukadinovich v. Board of Sch. Trs. of N. Newton Sch. Corp.*, 278 F.3d 693, 698-99 (7th Cir. 2002).**

The mere existence of an alleged factual dispute is not sufficient to defeat a summary judgment motion. ***Anderson v. Liberty Lobby*, 477 U.S. 242, 247 (1986); *Salvadori v. Franklin Sch. Dist.*, 293 F.3d 989, 996 (7th Cir. 2002).** Rather, to successfully oppose summary judgment, the nonmovant must present definite, competent evidence in rebuttal. ***Vukadinovich*, 278 F.3d at 699.**

The Seventh Circuit has clarified that the "usual Rule 56 standard of review applies to cross-motions for summary judgment." ***Int'l Brotherhood of Elec. Workers v. Balmoral Racing Club, Inc.*, 293 F.3d 402, 404 (7th Cir. 2002) (citing *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 349 (7th Cir. 1983).** Thus, in evaluating the District's arguments for summary judgment and determining whether a genuine issue of material fact remains, the Court construes the record in the light most favorable to non-movants, the Lochs. In evaluating the Lochs's motion and determining whether a genuine issue of material fact remains, the Court construes the record in the light most favorable to non-movant, the District.

III. Analysis

A. Whether the District is entitled to summary judgment on certain claims in Counts II and IV because the Lochs's claims are untimely

The District contends that most allegations

in Counts II (§ 504) and IV (§ 1983) are barred by the applicable two-year statute of limitations. Specifically, the District argues that Kayla's claims regarding incidents in her freshman (2002-2003) and sophomore years (2003-2004), prior to January 10, 2004, are entirely barred. Kayla filed her initial complaint on January 10, 2006.

The Lochs do not argue that the two-year statute of limitations is inapplicable. Rather, they argue that their claims are timely because they did not begin to accrue until the Lochs had knowledge of the injury. Among the dates proposed by the Lochs, only one falls within the two year-period prior to their filing the instant complaint: Thomas's and Glenna's filing for an IDEA due process hearing on February 11, 2005. *See* Doc. 168, p. 3, fn 1. The Lochs also contend that their claims remain timely under the continuing violations doctrine because the discrimination and injury are ongoing. The District controverts this latter assertion, arguing that the continuing violations doctrine is inapplicable outside employment settings and, in the alternative, is inapplicable to the facts of this proceeding.

Section 504 of the Rehabilitation Act contains no statute of limitations, so the Court borrows the two-year statute of limitations applicable to personal injury suits in Illinois. ***Bush v. Commonwealth Edison Co.,*** **990 F.2d 928, 933 (7th Cir. 1993) (citing Il1.Rev.Stat. ch. 110, ¶ 13202;** ***Wilson v. Garcia,*** **471 U.S. 261, 276 (1985).** Similarly, § 1983 does not contain an express statute of limitations, and the Court adopts the two-year limitations period for personal injury claims. ***Henderson v. Bolanda,*** **253 F.3d 928, 931 (7th Cir. 2001) (citing 735 ILCS § 5/13-202;**

Wilson, 471 U.S. at id.).

Pinpointing accrual in the present case poses a complex question, inasmuch as the Lochs' s action challenges an entire course of conduct by the District. However, the *injury* alleged in this case is denial of special education benefits, the failure to provide certain procedural safeguards and denial of reimbursement for attending classes at LCCC. The limitations period does not run from the various dates of the individual discrete injuries as suggested by the District, but rather from the date that the District denied the special education program the Lochs sought. See, e. g., Bd. of Educ. v. Wolinsky, 842 F.Supp. 1080, 1085 (N.D.I11. 1993). Thus, the two-year limitations period began on January 18, 2005, when the District notified Thomas and Glenna that Kayla was not eligible for special education and related services.

Alternatively, because the IDEA requires administrative exhaustion before Rehabilitation Act or § 1983 claims premised on IDEA violations can be brought in state or federal court, the Lochs's § 504 and § 1983 claims may not have accrued until January 24, 2005, the date they requested a due process hearing, as required under § 1415(/). *See Weyrick v. New Albany-Floyd County Consolidated School Corp.,* 2004 WL 3059793, 15 (S.D.Ind. 2004) (citing 20 U.S.C. § 1415(*1*); *Marie 0. v. Edgar,* 131 F.3d 610, 622 (7th Cir. 1997)). Considering the accrual date under either of these standards, this action, filed January 10, 2006, is timely.

B. Whether the District is entitled to summary judgment on the majority of Counts I, II, IV, VI and IX because the Lochs failed to

exhaust administrative remedies

The District asserts that several claims asserted in Counts I, II, IV, VI and IX could have been remedied had the Lochs properly raised them at the due process hearing. The District contends that the issue of the adequacy and completeness of the District's evaluations was not raised with the HO and that the HO made no factual findings and issued no order with respect to this claim. According to the District, Thomas conceded that the District complied with the regulations when identifying what additional information was needed for the evaluation and complied with the requirements for determining what information should be considered as part of an evaluation. Stated simply, the District contends that Thomas disagreed with the IEP team's conclusions rather than with the sufficiency of the evaluation. Consequently, the District argues that the exhaustion requirement bars the Lochs from now disputing the evaluation process. The District also urges that the Lochs cannot avoid the exhaustion requirement by an end run around IDEA requirements and the relief available under the IDEA.

The Lochs agree that the IDEA requires exhaustion of administrative remedies before pursuing claims under § 504, ADA and § 1983 claims but contend that they are not required to argue these claims to the hearing officer. Rather, according to the Lochs, since they requested and attended an IDEA due process hearing, the Court may consider related § 504, ADA and § 1983 claims on their merits without further exhaustion. Additionally, the Lochs contend that they raised

issues regarding, *inter alia*, the correctness and timeliness of the District's review and determination as to Kayla's eligibility for special education and whether the District's actions were discriminatory or retaliatory in nature.

The Court is guided by the Seventh Circuit's analysis in ***Charlie F. v. Bd. of Educ.*, 98 F.3d 989 (7th Cir. 1996).** In ***Charlie F.***, a disabled student brought suit against the Board of Education, not under the IDEA, but under § 1983, the Rehabilitation Act, the ADA and the state law of torts. Nonetheless, the Seventh Circuit determined that the exhaustion requirement of the IDEA governed, citing the following provision:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter. ***Charlie F.*, 98 F.3d at 991 (citing 20 U.S.C. § 1415(l).**

The Court stated that "any pupil who wants 'relief that is available under the IDEA must use the IDEA's administrative system, even if he

invokes a different statute."5 *Id.* The Court explained that, under the IDEA, educational professionals get "the first crack at formulating a plan to overcome the consequences of educational shortfalls." *Id.* at 992. If the parents are dissatisfied with the remedies offered and demand compensation, "the response should be that they cannot ignore remedies available under the IDEA and insist on those of their own devising[.]" *Id.*

Therefore, the Lochs were required to properly raise their claims at the due process hearing and to give the District the opportunity to provide a remedy before repairing to the courts. The Lochs's contention that merely requesting and attending an IDEA due process hearing is sufficient to exhaust claims under § 504, the ADA and § 1983 must fail. The question then is whether the adequacy and completeness of the District's evaluations were raised at the due process hearing.

As of the April 1, 2005, pre-hearing conference, the following issues were before the HO at the due process hearing:

> 1. Whether the district's review and determination of eligibility [were] correct?
> 2. Whether the eligibility determination was timely made?
> 3. Whether parents are entitled to reimbursement for student's unilateral placement at the community college?

---

[5] The Court notes that, under certain circumstances, a plaintiff may not need to first exhaust administrative remedies under the IDEA upon a showing that exhaustion would be futile. *McCormick v. Waukegan Sch. Dist. #60*, 374 F.3d 564, 569 (7th Cir.2004). No such showing has been made in this case.

4. Whether student should be found eligible under emotional disturbance for failure of the school district to follow student's 504 plan? Doc. 1, Exhibit A, p. 2.

Over the District's objection, on July 14, 2005, the following issues were added pertaining to procedural violations:

1. Whether the district provided written notice pursuant to 20 U.S.C. 1415(b)(3) and (c) within a reasonable time to parents prior to proposing, or refusing to initiate, or change the identification, evaluation, placement or provision of a free appropriate public education?

2. Whether the district provided prior written notice of the evaluations which the district conducted with respect to the case study evaluation?

3. Whether the district provided parents with information on specific procedures required for pursuing a referral?

4. Whether the district provided procedures for presenting complaints?

5. Whether the district was required to provided prior written notice prior to expelling student from school rolls during pendency of the due process proceeding?

6. [6] 6 Whether the district was required to provide procedures or written notice concerning the placement determination made by parents when notified by parents?

7. Whether the district provided procedures, written notice/follow-up concerning the placement determination when notified?

8. Whether the district complied with requirements for disclosure of evaluation results and recommendations provided by district personnel? Doc. 1, Exhibit A, p. 3.

In Count I, Kayla alleges that the District's evaluation process was inadequate, incomplete and subjective. She further alleges that the District's "school team" evaluated her in a haphazard manner and erred in determining that she was ineligible for special education and related services.

None of the issues before the HO involve the adequacy, completeness and objectivity of the District's evaluation process, and the HO made no findings as to these issues. Evaluating whether the District made a correct determination differs from evaluating whether the District followed the correct process in arriving at that determination, or, more simply, the end is not the same as the means. As the District correctly points out, Thomas disagreed with the IEP team's conclusions rather than with

---

[6] The Court has renumbered these questions, which were misnumbered in the HO's Decision and Order. See Doc. 1, Exhibit A, p.3.

the sufficiency of the evaluation. If the sufficiency of the District's evaluation had been at issue, the HO would have considered and discussed the domain meeting and the requirements for conducting an evaluation set forth in 34 C.F.R. § 300.532. Certainly, the HO's order would have addressed the sufficiency of the evaluation if that issue had been before her. For these reasons, the Court finds that the Lochs have not exhausted the issue of the sufficiency of the evaluation process, and they are barred from arguing it before this Court. The Court will dismiss Kayla's claim in Count I regarding the sufficiency of the evaluation process (Count I (D)).

Similarly, the exhaustion requirement bars the Lochs's claims under Counts II (Kayla's claims under § 504 and the ADA), VI (Glenna's discrimination and retaliation claims under Title VI, § 504, ADA and Title IX) and IX (Thomas's discrimination and retaliation claims under Title VI, § 504, ADA and Title IX). The relief that the Lochs seek is available under the IDEA for alleged discrimination and retaliation related to Kayla's disability under § 504 and the ADA, including overturning the HO's decision and reimbursement for Kayla's attending LCCC.

It is easily seen from the lists of issues before the HO that Glenna's and Thomas's claims of discrimination and retaliation were not among the issues raised. Consequently, even though these claims are brought under statutes other than the IDEA, they are barred by the Lochs's failure to exhaust. As set forth above, the IDEA does not limit relief available under other laws; nonetheless, parties must exhaust their claims "to the same extent as would be required had the action been

brought under this subchapter." ***Charlie F.*, 98 F.3d *at* 991 (citing 20 U.S.C. § 1415(f).**

Moreover, as to the claims for reimbursement for classes at LCCC, educational opportunities expense is available under the IDEA. The Lochs cannot avoid IDEA requirements and remedies by requesting damages under different statutes but based upon the same facts. The Court again turns to the analysis undertaken by the Seventh Circuit in ***Charlie F.*** Therein, the parents demanded monetary compensation for educational services that were not available through the local school district and that the district was not required to provide.7 Similarly, here, Kayla seeks monetary compensation in the form of tuition and expenses for seeking educational opportunities at LCCC, a service that was not available and that the District was not required to provide.

First, the Seventh Circuit observed that the IDEA does not authorize compensatory money damages. ***Charlie F.*, 98 F.3d at 991.** The analysis does not stop, however, with the unavailability of this form of relief under the IDEA. ***Id.*** The Seventh Circuit construed 'relief available' to mean relief for the events, condition, or consequences of which the person complains, not necessarily relief of the kind the person prefers." *Id.* The Court explained as follows:

> The statute speaks of available relief, and what relief is 'available' does

---

[7] EHS Principal Norm Bohnenstiehl testified as follows: "We have not allowed students to take courses outside of our high school, like at Lewis and Clark Community College or S.I.U. that would count towards graduation." Bohenstiehl Deposition, 18:2-5

> not necessarily depend on what the aggrieved party wants.... The nature of the claim and the governing law determine the relief no matter what the plaintiff demands.... By making an unreasonable or unattainable demand parents cannot opt out of the IDEA.... Perhaps Charlie's adverse reaction to the events of fourth grade cannot be overcome by services available under the IDEA and the regulations, so that in the end money is the only balm. But parents cannot know that without asking, any more than we can. Both the genesis and the manifestations of the problem are educational; the IDEA offers comprehensive educational solutions; we conclude, therefore, that at least in principle relief is available under the IDEA. ***Id. at*** **991-93 (internal citations omitted).**

Kayla wants money to pay for her classes at LCCC. The Court could measure damages by the cost of these services. Yet, the District is able, indeed is required, to provide these services in kind under the IDEA. There is no dispute that classes were available at EHS to enable Kayla to obtain a high school diploma. The Lochs were dissatisfied with what the District offered and demanded that the District pay for Kayla to take classes at LCCC, which was an unreasonable and unattainable demand. The Court is unwilling to allow the Lochs to opt out of the IDEA because it does not offer them the choices that they want, when the District was and remains willing to take corrective steps to

resolve their claims. For all of these reasons, the Court will dismiss Count II, VI and IX.

C. Whether the District is entitled to summary judgment on Counts I, V and VIII because the Lochs cannot establish that the HO's decision was in error

The District argues that the Lochs are unable to meet their burden of proving that the HO's decision was clearly in error. Specifically, the District argues that (1) the Lochs have the burden of proving that the HO's decision was in error; (2) the HO appropriately decided that Kayla was not eligible for special education; and (3) the HO correctly found that the District satisfied IDEA procedural requirements.

The Lochs do not dispute that it is their burden to show that the HO's decision was in error. The issues the Lochs raise are that the HO erred in determining that Kayla was not a child with a disability; and (2) erred in interpreting 34 C.F.R. § 300.7(c)(4)(i) as requiring an adverse educational effect over a long period of time.

The Court gives "due weight" to the HO's findings and reviews them under "a standard that is more stringent than the substantial evidence standard but less than *de novo* review." ***Krista P. v. Manhattan Sch. Dist.,*** **255 F.Supp.2d 873, 884 (N.D.III. 2003) (citing *Heather S. v. Wis.,* 125 F.3d 1045, 1052 (7th Cir. 1997).** The standard of review in IDEA cases is "a sliding scale, with a more searching review necessary the greater the amount of new evidence submitted to the court." ***Id. (citing Sch. Dist. of Wis. Dells v. Littlegeorge,* 295 F.3d 671, 675 (7th Cir. 2002).**

When, as in the current case, no new evidence is submitted, the court applies a standard that is "basically the clear-error or substantial-evidence standard." *Id.* Under this deferential review, the Court independently evaluates the testimony and evidence but cannot substitute its own ideas of sound educational policy for those of the school authorities. ***Id.* (citing *Bd. of Educ. of Cmty. Consol. Sch. Dist. 21 v. ISBE,* 938 F.2d 712, 715-16 (7th Cir. 1991) (citing *Bd. of Educ. v. Rowley,* 458 U.S. 176, 206 (1982)).**

1. **Whether Kayla is a "child with a disability"**

The District is correct that the Lochs, as the parties challenging the decision, bear the burden of persuasion on their claim. ***Bd. of Educ. v. Illinois State Bd. of Educ.,* 2006 WL 2989289, (N.D. Ill. 2006).** A child with a suspected learning disability must meet the statutory criteria for "child with a disability" to receive IDEA protection. **20 U.S.C. § 1401(3).** The parties dispute whether Kayla is a "child with a disability" under the federal and state definitions such that she is qualified for special education and related services under the IDEA. ***See* 20 U.S.C. § 1412(a)(1)(A).**

Under federal law, a "child with a disability" is defined as having "...a serious emotional disturbance ... an other health impairment ... and who, by reason thereof, needs special education and related services." **34 C.F.R. § 300.7(a)(1).**[8]

[8] The Court notes that the citations to the Code of Federal Regulations and the Illinois Administrative Code are no longer accurate, e.g., 34 C.F.R. § 300.7 was effective to

"An other health impairment," commonly referred to as an OHI, is defined in 34 C.F.R. § 300.7(c)(9) and 23 Ill. Adm. Code § 226.75 as follows:

> having limited strength, vitality or alertness, including a heightened alertness with respect to the educational environment, that –
>
> (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia; and
>
> (ii) Adversely affects a child's educational performance. 34 **C.F.R. § 300.7(c)(9).**

As the HO properly found, diabetes is a condition that may qualify a child for special education and related services if, after conducting an evaluation pursuant to 34 C.F.R. § 300.530-33.543, it is determined that the child requires those services.

Because Kayla was also diagnosed with an

October 12, 2006, and the definition of "child with a disability" is now found in 34 C.F.R. § 300.8. Because the Court reviews the administrative record as of the date the due processing hearing was held, it will refer to predecessor regulations and statues.

emotional disturbance, the HO considered her case in light of 34 C.F.R. § 300.8(c)(4) and 23 Ill. Adm. Code § 226.75, where emotional disturbance is defined as follows:

> (i) Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
> (C) Inappropriate types of behavior or feelings under normal circumstances.
> (D) A general pervasive mood of unhappiness or depression.
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.
>
> (ii) Emotional disturbance includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section. 34 C.F.R. § 300.7(c)(4).

The Court finds no error in the HO's decision that Kayla is not a "child with a disability." Kayla is being treated for diabetes and has been treated at times for emotional problems. However, there is no proof that these conditions affected her

educational performance to the extent that she required special services and programs.

On August 29, 2003, the school nurse, Pam Harmon, R. N., wrote a letter to Kayla's pediatric endocrinologist, Costa Voulgaropoulos, M. D., in which she sought information to complete Kayla's health plan. Voulgaropoulos's Deposition, Exhibit 6. Therein, Harmon noted Kayla's history of "excessive absenteeism and tardiness attributed to her diabetic condition." *Id.* On September 4, 2003, Dr. Voulgaropoulos responded as follows:

> [D]iabetes mellitus type I under good control is not a reason for excessive absenteeism and tardiness, although complications such as mild depression, stress, or physical complications may lead to functional impairments. Teenagers with diabetes who manage their insulin, diet, blood sugars and physical activity are expected to be able to function at the level of non-diabetic peers. *Id.* Exhibit 7.

Kayla received all passing grades for her freshman year, including one A, six Bs, three Cs and one D for courses including Honors English, Integrated Algebra, Honors Biology, Government and Spanish.[9] It was not until the fourth quarter of tenth grade that Kayla's educational performance suffered. Kayla testified that towards

---

[9] Integrated Algebra is a class for students who are less proficient in math. Doc. 162, Exhibit B, Farley Deposition 18:9-23. Kayla received an A- and a B+ for her two semesters of Integrated Algebra.

the end of her sophomore year, she "was hardly ever there. Maybe once a week." Doc. 162, Exhibit D, Kayla's Deposition (Kayla's Dep.) 133:3-6.

When asked if teachers refused to accept make-up work from her during her sophomore year, Kayla answered, "No." *Id.* 132:10-13. She then testified that she had "given up" and stopped turning in any make-up work towards the end of the second semester of her sophomore year. *Id.* 132:14-24 She received two Fs for classes in which she missed 40 days and a third F for a class in which she missed 31 classes.10

The school psychologist testified that Kayla met none of the criteria for emotional disturbance and that she observed no adverse education effects. More specifically, she testified that, although Kayla was absent a great deal and, thus, missed instruction, she was still able to do makeup work on her own and successfully complete assignments.

The director of special education testified that no documentation was presented at the January 18, 2005, meeting to substantiate that all of Kayla's absences were due to her diabetes. The Lochs offer no evidence of increased severity of symptoms occurring in Kayla's physical or emotional health during the second semester of tenth grade that would justify her absences – or explain why she stopped making up her class work.

The undersigned district judge agrees with the HO that Kayla "just quit going to EHS." Doc. 1,

---

[10] If Kayla had been in attendance at the start of her junior year, she would have had the opportunity for an "academic retake," i.e., to retake classes and replace the failing grade with a new grade. Farley Dep. 19:4-13.

Exhibit A, Decision and Order, p. 16. Until Kayla stopped attending classes and stopped making up her work, she was achieving well and did not need specialized instruction. Kayla's OHI did not adversely affect her educational performance; consequently, she does not meet the statutory requirements that could qualify her for special education and related services.

2. Timeliness of the District's evaluation

The Lochs assert that there was a delay in the District's evaluating Kayla. However, the record is clear that the IEP meeting was held well within the time period allotted by statute for the District's compliance with a parent's request. Pursuant to the Illinois Administrative Code, the determination of a student's eligibility must be made and the IEP meeting completed "no later than 60 school days following the date of written consent from the parent to perform the needed assessments." **23 IL ADC 226.110(d) (emphasis added).** Thomas filed a consent for evaluation on October 29, 2004. The District timely conducted the evaluation and held the IEP meeting on January 18, 2005, which was well within 60 school days after Thomas's consent. Accordingly, the HO's decision as to timeliness must be upheld.

3. Whether the District failed to follow Kayla's 504 plan and, thus, caused her to become emotionally disturbed

The Lochs assert that Kayla should have been found eligible for special education and related services because the District's failure to

follow her 504 plan caused her to become emotionally disturbed.

Kayla's freshman 504 plan, drafted by Thomas and Glenna, was accepted by the EHS coordinator as written. It included, among others, the following accommodations: (1) Kayla was to have a "buddy" available when she was suffering from low blood sugar; (2) she was to be allowed to eat and drink in class; (3) she was to be given "reasonable extended due dates" on homework and tests; and (4) substitute teachers were to be informed of her accommodations.

A team, which included, among others, Kayla's teachers, the school nurse, and the Director of Student Services, met with Thomas to prepare Kayla's sophomore 504 plan. Among the accommodations provided were the following: (1) Kayla could visit the nurse any time to have her sugar checked by leaving class with her agenda book and notifying staff of her departure; (2) a "buddy" would be available when Kayla was suffering from "low sugar"; (3) during absences, Kayla would receive one day for every day missed to make up work; and (4) Kayla was allowed to drink fluids and use the restroom.

Kayla testified that, routinely, she had no problems with her teachers following her 504 plan. *See, generally,* Kayla's Dep. 99:13-105:23; 158:4-161:13. However, there were instances in which her 504 plan was not followed. Kayla testified that a teacher during her freshman year at one time refused to accept her make-up work. *Id.* 95:18-20. She also indicated that her grade was reduced by 50% once when she turned it in late. Id. 96:5-7.[11]

---

[11] The Court notes that at other times during Kayla's

One of Kayla's teachers during her sophomore year embarrassed Kayla in front of the class by suggesting that Kayla was using her diabetes as an excuse for being absent. *Id.* 97:9-23. Kayla spoke to the teacher about her condition after class, and the teacher did not refer to her diabetes again and apologized for her comments. *Id.* 98:8-10. One teacher issued Kayla a detention for being late after warning Kayla and after Kayla was tardy for the third time. *Id.* 101:5-9:7. Once, Kayla was stopped in the hall on her way to the nurse because she did not have a hall pass. *Id.* 106:6-22.

Two substitute teachers were apparently unaware of Kayla's 504 plan. One substitute asked what she was doing when she pricked her finger during class to check her blood sugar level. *Id.* 93:4-10. Apparently, the same substitute objected to her bringing a bottle of water into the classroom. *Id.* 129:3-130:14. She did not complain to anyone about the incidents with the substitute teacher, and her regular teacher followed her 504 plan. *Id.* 160:6-18. Another substitute refused to allow her to leave class until the regular instructor returned.

The Court agrees with the HO that, over a two-year period, the instances in which the District failed to follow Kayla's 504 plan were infrequent

---

deposition she related that the majority of her teachers during her sophomore year reduced her grade by 50% when she turned in late work. *See. e.g.*, Kayla's dep. 125:11-14. Kayla testified that her sophomore math teacher, Ms. Larsson, took 50% off every paper turned in late; however, Kayla was unable to produce any document evidencing that was the teacher's practice. Kayla Dep. 37:20-38:1. Kayla did not contact Ms. Larsson during the last two to three months of her sophomore year when she was not attending school. *Id.* 38:3-13.

and that the staff made every effort to follow her plan. Indeed, in reviewing Kayla's testimony, the Court observes that Kayla was very able to speak up for herself and to take appropriate action when any problems arose. As found by the HO, Kayla's medical records do not reflect that any of her difficulties in June, 2003, were caused by a failure to follow her 504 plan. Nor is there evidence that those failures that occasionally occurred caused her to be disabled in a way that required special education or related services. As the HO summed up, Kayla just quit going to EHS.

C. Prior notice

The Lochs assert that Kayla was denied a FAPE by the District's failure to give prior written notice or failure to follow-up as to the following: (1) the evaluations that the District was going to conduct with respect to Kayla's Case Study Evaluation; (2) the determination that Kayla was not eligible for special education and related services; (3) when notified that Kayla would be attending LCCC; and (4) in removing Kayla from the school rolls.

Pursuant to 34 C.F.R. § 300.503, the requirements for prior notice by a public agency are as follows:

> (a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of *a child with a disability* a reasonable time before the public agency--
>
> (1) Proposes to initiate or change the identification, evaluation, or

> educational placement of the child or the provision of FAPE to the child; or
> (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. § 300.503(a) (emphasis added).

As in ***Krista P, supra,*** which the HO relied upon in arriving at her conclusion regarding prior notice, the Lochs were not entitled to prior written notice under the above statute because Kayla had not been identified as "a child with a disability. **255 F.Supp.2d at 889.** Going a step further, the HO determined that, even if the Lochs were entitled to prior notice, the District had provided it. In particular, the HO found that (1) Thomas was present at the October 29, 2004, collaborative team meeting and did not deny receiving the team meeting summary and recommendations for the domains in which Kayla would be tested; (2) Thomas and Glenna did not deny receiving a copy of the written report that contained documentation of the ineligibility determinations; and (3) Thomas and Glenna were provided with a copy of the collaborative team's report on October 29, 2004, and the IEP team's report and notice of the team's determination on January 18, 2005. No further notice was necessary after Thomas and Glenna unilaterally placed Kayla at LCCC, although the District sent letters and made telephone calls informing the Lochs that Kayla would be dropped from enrollment at EHS if she did not attend school. The HO's determination that ample prior notice was given to the Lochs, even though not required by statute, is well supported by the record.

D. Specific procedures for pursuing a referral for a case study evaluation

The Lochs assert that the District failed to provide them with any specific procedures for pursuing a referral for a case study evaluation. The HO's determination as to this issue is, again, well founded. The assistant superintendent explained to Thomas on September 3, 2004, how out-of-district placements might be paid for by the District if the student had an IEP. The assistant superintendent followed up, on September 16, 2004, by sending Thomas a letter and a parents' rights booklet. Furthermore, as the District points out, Thomas and Glenna received a copy of EHS's 2004-2005 handbook, which provides information on how to request an evaluation. There is no contrary evidence to support the Lochs's position that information was withheld from them.

In sum, the Court finds no error in the HO's Decision and Order, and the District is entitled to summary judgment on Counts I, V and VIII.

E. Whether the District is entitled to summary judgment on Count III[12] because Kayla cannot establish a *prima facie case* of gender discrimination

Kayla contends that she was discriminated against because of her sex when she was denied access to educational opportunities offered male students, *i. e.,* denied a "stay put" provision with

---

[12] The District mistakenly refers to Kayla's sex discrimination claim as Count IX. *Cf.* Amended Complaint, pp.

respect to her LCCC classes, denied consideration for first period study hall, denied a "permission letter" to continue at LCCC, refused the ability to have her "dual credit" courses accepted towards high school graduation and "refused access to such programs as 105 ILCS 5/Article 13B."

The District responds that Kayla has presented no direct evidence of discrimination and, therefore, must attempt to establish her case through the three-step approach adopted in ***McDonnell Douglas*** *v.* ***Green,*** **411 U.S. 792 (1973).** The District contends that Kayla cannot show that the District complied with the IDEA for male students but not for her or that the District permitted male students to attend college in lieu of attending high school but did not so permit her.

Title IX of the Education Amendments Act of 1972 ("Title IX"), as amended, states, in relevant part, that "[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]" **20 U.S.C. § 1681(a).** As the Seventh Circuit has indicated, "federal courts look to cases decided under Title VII to inform analysis under Title IX." ***Doe v. University of Illinois,*** **138 F.3d 653, 663 (7th Cir. 1998).**

In order to prove sexual discrimination under Title VII, a plaintiff may rely on direct evidence showing that she was treated less favorably because of her sex, or she may attempt to establish her case through the indirect, burden-shifting method set forth in *McDonnell Douglas Corp v. Green,* 411 U.S. 792 (1973). ***El-Marazki v. Univ. of Wis. Syst. Bd. of Regents,*** **1998 WL**

23690, 3 (7th Cir. 1998) (citing Cheek v. Peabody Coal Co., 97 F.3d 200, 203 (7th Cir.1996). Under the McDonnell Douglas approach, to state a claim under Title IX, Kayla must show the following: "(1) that she was excluded from participation in, denied benefits of, or subjected to discrimination in an educational program; (2) that the exclusion was on the basis of sex; and (3) that defendant receives federal financial assistance." ***Adams v. Lewis University,* 1999 WL 162762, 4 (N.D. Ill. 1999) (citations omitted).**

The Lochs offer no direct evidence of sex discrimination; therefore, the Court's analysis continues under the *McDonnell Douglas* approach. The third factor is established because there is no question that the District receives federal financial assistance. However, assuming, *arguendo,* that all Kayla's assertions are true and that she was excluded from participation in, denied benefits of, or subjected to discrimination in an educational program, nonetheless, she has not established that these denials were on the basis of sex.

The Loch's first arguments are irrelevant and immaterial. Whether the EHS principal and the assistant superintendent were deliberately indifferent to the Loch's request for accommodations and whether "a lack of training, gross misjudgment, or pure utter ignorance" caused them to fail to recognize Kayla's request for an IEP does not even suggest that these actions were undertaken on the basis of sex.

The Loch's final argument is equally unavailing. They allege that "alternative programs that are available are afforded to male students at a 4 to 1 advantage over female students." However,

their evidence consists of references to approved alternative education programs offered by the District and not to self-directed enrollment in classes at LCCC to earn credits for graduation at EHS. The Lochs identify the following programs with participation by gender:

> Private Day School – IEP students
> 77% male, 23% female
>
> Collinsville Area Vocational Center
> 82% male, 18% female
>
> Correspondence Course Program
> 69% male, 31% female

First, there may be many reasons other than gender bias why these programs predominantly have male students. More importantly, for current proceeding, Kayla did not seek and was not denied admittance to any of these programs. The Lochs wanted the District to create a new program that would allow Kayla to take classes at LCCC at her own discretion yet gain graduation credits and obtain a diploma from EHS. There is no question of sex discrimination posed because the program the Lochs wanted was not available to female or male students. The Lochs's demands were simply unreasonable. The Lochs have failed to state a claim under Title IX; therefore, the Court will dismiss Count III of Plaintiff's amended complaint.

IV. Conclusion

For all of the reasons stated above, the Court **GRANTS** the District's motion for summary judgment (Doc. 161) and **DENIES** the Loch's Motion for summary judgment (Doc. 163). The Clerk of Court **SHALL ENTER JUDGMENT** in favor of Defendant, Board of Education of Edwardsville Community School District #7, and against Plaintiffs, Thomas H. Loch, Glenna H. Loch and Kayla N. Loch.

IT IS SO ORDERED.

DATED this 15th day of July, 2008

s/MichaelJ.Reagan

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

Filed 6/12/2008

THOMAS H. LOCH, GLENNA H. LOCH and KAYLA N. LOCH	)
Plaintiffs,	)
v.	)
	)Civil
	)ActionNo.
	)3:06-cv-17-
	)MJR
BOARD OF EDUCATION OF EDWARDSVILLE COMMUNITY SCHOOL DISTRICT #7,	)
Defendant.	)

MEMORANDUM AND ORDER

REAGAN, District Judge:

I. Procedural and Factual Background

This case presents a host of claims and issues concerning the education of Plaintiff Kayla Loch ("Kayla").13 At the core of this action are claims arising under the Individual with Disabilities Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*,

---

[13] To avoid confusion, the Court will refer to Plaintiffs by their given names, Kayla, Thomas and Glenna where appropriate.

although Plaintiffs have also brought claims pursuant to 42 U.S.C. § 1983, the American with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101, *et seq.*, Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. §§ 794 *et seq.*, the Civil Rights Restoration Act of 1987 ("CRRA"), Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d, *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* This action now proceeds on Plaintiffs' amended complaint, filed November 8, 2006 (Doc. 44).

Plaintiffs contend that Defendant, Board of Education of Edwardsville Community School District #7 ("the District"), violated Kayla's right to a free appropriate public education ("FAPE") under the IDEA and § 504 of the Rehabilitation Act, as well as the rights of her parents, Thomas and Glenna, under the ADA and IDEA.[14] Kayla contends that, *inter alia*, the District failed to evaluate her in a timely manner, refused to honor dual credit courses and discriminated against her on the basis of sex.[15] Kayla's parents, Thomas and Glenna, allege that the District violated the procedural requirements of the IDEA, and retaliated and discriminated against them for having filed a complaint with the Human Rights Authority.

The action comes following a timely appeal of

---

[14] On May 18, 2007, the Court dismissed Glenna's and Thomas's § 1983 claims, Counts VII (Glenna) and X (Thomas), for lack of standing. *See* Doc. 76.

[15] On May 18, 2007, the Court dismissed Kayla's claims of sex discrimination (Count III). *See* Doc. 76.

an administrative due process hearing where Thomas and Glenna raised, explored and exhausted administrative remedies to enforce Kayla's rights and their own under the relevant statutes. Plaintiffs challenge the administrative findings of the Impartial Hearing Officer, Gail Friedman, rendered following the six-day hearing.

At the time that Plaintiffs filed their amended complaint, Kayla was an eighteen-year old student who attended Edwardsville Community Unit School District No. 7.16 Kayla was ten when she was diagnosed with juvenile diabetes and fourteen when she was diagnosed with emotional disabilities. After Kayla was diagnosed with diabetes, the school district developed a plan for accommodating her disability under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (commonly known as a "504 plan"). Although Kayla began to miss school regularly, she maintained good grades, and teachers continued to rate her social development well. Her attendance record eroded further in eighth and ninth grades and the first semester of tenth grade, but she still kept up with her work and performed well.

Plaintiffs allege that, beginning with her freshman year at Edwardsville High School ("EHS"), school staff failed to follow the 504 Plan written for Kayla and did not conduct meetings with her instructors to cover her 504 Plan formally. As a result, EHS staff and instructors did not accommodate her, as noted in her 504 Plan, such as not allowing her to receive full credit for late or

---

[16] For the sake of clarity and completeness, the Court here restates the factual background originally set forth in its May 18, 2007 Order. See Doc. 72.

make-up work. As a result of the difficulties Kayla had with her 504 Plan, Thomas and Glenna filed a complaint with the Human Rights Authority of the Illinois Guardianship and Advocacy Commission ("HRA"). The HRA concluded that EHS violated Kayla's rights in the fall of 2002 when it failed to follow appropriate procedures.

In March, 2004, during the second semester of her sophomore year, Kayla stopped attending classes at EHS and began to attend Lewis and Clark Community College ("LCCC"). Plaintiffs claim that they took this step because of EHS's failure to accommodate her disability. EHS was not aware of the reason Kayla stopped attending or completing her work; she failed most of her classes that semester, and her enrollment was eventually dropped.

In July, 2004, Plaintiffs met with the principal of EHS and presented a proposed plan for Kayla's schooling in the next academic year. The proposal specified that Kayla was to remain registered at EHS but would take all of her classes at LCCC, for which she would receive credit toward graduation from EHS. The principal stated that school board guidelines did not allow such an arrangement but that he and the assistant superintendent for curriculum would work with Plaintiffs to devise an appropriate plan for Kayla's continued education at EHS. Shortly thereafter, Thomas requested an evaluation under the IDEA to determine whether Kayla was eligible for special education. School officials conducted a series of tests, including the typical battery of tests for evaluating adolescent function and environmental adjustment. They also met with Kayla' s therapist, psychiatrist and pediatric endocrinologist. Later,

the testing team and school administrators met with Thomas and Glenna to discuss the results. Kayla's intellectual and psychological functioning were well within the normal category, but on her Behavior Rating Scale, the "School Maladjustment" domain categorized her as "at risk." The meeting also dealt with Kayla's conflicts with her teachers over her diabetes accommodations and her social conflicts with other students. The meeting resulted in a finding that Kayla was not in need of special education services.

Thomas disagreed with the finding, asked for a Section 504 meeting, and reiterated his request that Kayla receive EHS credit for taking LCCC classes. This request was again denied, and Plaintiffs were told that a Section 504 meeting could be scheduled when Kayla re-enrolled at EHS. After their requests were denied, Plaintiffs submitted a request for a due process hearing. The hearing did not result in a change in Kayla' s status or her eligibility for special education. Plaintiffs could not obtain the accommodations that they sought, and this lawsuit followed.

Plaintiffs now move to supplement the administrative record with the addition of the transcripts of seventeen depositions and an unspecified number of documents (Doc. 148).

II. Analysis

The IDEA provides that a district court "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20

U.S.C. § 1415(i)(2). The question then is what is appropriate "additional" evidence in IDEA cases. The seminal case for assessing the need for additional evidence, expressly adopted by the Seventh Circuit Court of Appeals, is ***Burlington v. Dep't of Educ.*, 736 F.2d 773 (1st Cir. 1984), *aff'd on other grounds, Burlington Sch. Comm. v. Mass. Dep't of Educ.*, 471 U.S. 359 (1985). *See Monticello Sch. Dist. No. 25 v. George L.*, 102 F.3d 895, 901 (7th Cir.1996); *see also Patricia P. v. Bd. of Educ.*, 203 F.3d 462, 470 (7th Cir. 2000).**

The ***Burlington*** court construed "additional" to mean "supplemental." ***Burlington*, 736 F.2d at 790.** Relying on the United States Supreme Court's decision in ***Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982)** the First Circuit reasoned that it was to give "due weight" to the administrative proceedings and held that the administrative record should be the main source of evidence with limited supplementation. ***Id.*** While rejecting a rule that would "unduly limit" the reviewing court's discretion and "disallow testimony from all who did, or could have, testified before the administrative hearing," the court suggested a "practicable approach," *i.e.*, a rebuttable presumption in favor of foreclosing additional evidence. ***Id. at* 790-91; *see also Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659, 667 (4th Cir.1998) (quoting *Burlington*, 736 F.2d at 790) ("[T]he exclusion of 'testimony from all who did, or could have, testified before the administrative hearing' would be 'an appropriate limit in many cases.").**

Some of the reasons for supplementation suggested in ***Burlington*** were "gaps in the

administrative transcript owing to mechanical failure, unavailability of a witness, an improper exclusion of evidence by the administrative agency, and evidence concerning relevant events occurring subsequent to the administrative hearing." ***Id. at* 790.** While not exhaustive, this list provides guidance for the type of evidence that might be added to the record.

Contrary to Plaintiffs' suggestion, the Court does not review the administrative decision *de novo*. ***See Monticello Sch. Dist. No. 25 v. George L.*, 102 F.3d 895, 901 (7th Cir. 1996).** "[T]he determination of whether to allow additional evidence under § 1415(e)(2) 'must be left to the discretion of the trial court which must be careful not to allow such evidence to change the character of the hearing from one of review to a trial *de novo*.'" ***Bd. of Educ. v. Jeff S.*, 184 F.Supp.2d 790, 802 (C.D.I11. 2002) (citing *Monticello*, 102 F.3d at 901) (quoting *Burlington*, 736 F.2d at 791)).**

In addition to these standards, the Court's decision is guided by the following: (1) "Either party [at the due process hearing] may compel the attendance of any school district employee at the hearing, or any other person who may have information relevant to the needs, abilities, the proposed program, or the status of the student," ***Heather S. v. Niles Tp. High Sch. Dist. No. 219*, 1999 WL 1100931, 8 (N.D.I11. 1999) (citing 23 III. Admin. Code § 226.636(e)); (2)** "Any party may request that the due process hearing officer issue a subpoena to compel the testimony of witnesses or the production of documents relevant to the resolution of the hearing," **105 ILCS 5/14-8.02a(g-55);** and (3) "Each party shall at the

prehearing conference ... disclose the names of all witnesses it intends to call to testify at the hearing," *id. at* (g-40)(5).

Apply these standards to Plaintiffs' motion to supplement, the Court finds, first, that Glenna Loch, Mr. Basola, Mr. Bohnenstiehl and Ms. Kolda testified at the due process hearing and, consequently, Plaintiffs had ample opportunity to question them at that time. Second, Kayla Loch, Dr. Radmanesh, Dr. Voulgaropoulos, Ms. Mason, Ms. Farley and Mr. Everage were not "unavailable" but were on Plaintiffs' witness list, and Plaintiffs chose not to call them. Third, because Plaintiffs were able to compel the attendance of any school district employee at the due process hearing, the following witnesses were available to testify, but Plaintiffs chose not to call them: Mr. Hall, Ms. Grubaugh, Ms. Wessel, and Dr. Hightower. Plaintiffs have offered no reason why these witnesses were not called at the due process hearing and their testimony elicited at that time. Plaintiffs chose the witnesses called during the hearing and the questions asked of the witnesses called. They are bound by those decisions. It is not the Court's role, at this juncture, to allow them a second bite of the apple.

Thomas Loch was present at the hearing and questioned witnesses; however, because Plaintiffs failed to include him in the witness list, he was not permitted to testify. While the Court understands Plaintiffs' frustration, nonetheless, the statute is clear that each party must "disclose the names of all witnesses it intends to call to testify at the hearing." 5/14-8.02a(g-40)(5). To allow either party to call a witness to testify who was not disclosed in advance would subject the opposing party to unfair

surprise and prejudice.

The depositions of the remaining witnesses, Dr. Cramer and Dr. Ogle, are part of the record submitted to the Court. Kayla began counseling with Dr. Cramer on March 6, 2006. Cramer Dep., Exh. 1. Her counseling with Dr. Ogle began on March 9, 2006. Ogle Dep., Exh. 1. The due process hearing at issue commenced on May 18, 2005, and concluded on September 1, 2005. Thus, Kayla did not consult with these doctors until nearly ten months after the due process hearing commenced. The Court may take supplemental evidence regarding relevant events that occurred subsequent to the administrative hearing. ***See Burlington*, 736 F.3d at 790.** The question, then, is whether the testimony of these doctors is relevant to the due process appeal.

Plaintiffs shed little light on this issue, stating only that the testimony of these doctors "will provide additional testimony highly relevant to the Plaintiffs' claims ... and Kayla's on-going educational and related services needs." Doc. 157, p. 9. The District counters that it took Dr. Cramer's and Dr. Ogle's depositions because their testimony was relevant to defenses to non-IDEA counts of the Complaint and showed alternative causes of Plaintiffs' alleged emotional pain and suffering. According to the District, these doctors' deposition testimony is not relevant to the due process appeal. Moreover, the District contends that courts review school district decisions regarding the education of students with disabilities based on information that the District knew at the time of the decision and not at a later date.

Having carefully reviewed the doctors' depositions, the Court finds that they do not

augment the record in any meaningful way as to Kayla's educational needs and experiences in 2005. Plaintiffs have not pointed to, nor has the Court found, anything relevant in these depositions that is not already part of the administrative record and, thus, considered at the due process hearing. In sum, as to Dr. Cramer's and Dr. Ogle's depositions, Plaintiffs have failed to rebut the presumption in favor of foreclosing additional evidence.

Moreover, even if the depositions were admitted as "additional evidence," they would be unhelpful because the Court must base its review of the District's decisions regarding Kayla's education on the information available to the District at that time. As stated by the Third Circuit Court of Appeals, "Our understanding of *Rowley* comports with that of the district court: that the measure and adequacy of an [Individualized Education Program] ("IEP") can only be determined as of the time it is offered to the student, and not at some later date." ***Fuhrmann v. East Hanover Bd. of Educ.,* 993 F.2d 1031, 1040 (3d. Cir. 1993) (citing *Rowley,* 458 U.S. 176 at 206.** The court continued, "Neither the statute [20 U.S.C. § 1415] nor reason countenance 'Monday Morning Quarterbacking'in evaluating the appropriateness of a child's placement." ***Id.*** Neither Dr. Cramer nor Dr. Ogle counseled Kayla until March, 2006, more than a year after the IEP team met to consider her eligibility for special education services. Indeed, Kayla was a freshman at IUPUI (Indiana University Purdue University Indianapolis) when she first consulted with these doctors. The Court cannot judge the District's decision retrospectively, based on information that was not available to it when the decision was made.

Lastly, Plaintiffs wish to submit additional "Production of Documents" exhibits for the Court's review. Again, Plaintiffs offer no reason why these documents could not have been submitted at the due process hearing or what relevance they may have to the Court's decision. If they were in existence and Plaintiffs were unable to obtain them, the hearing officer could have compelled their production. **105 ILCS 5/14-8.02a(g-55) ("Any party may request that the due process hearing officer issue a subpoena to compel . . . the production of documents relevant to the resolution of the hearing.").** Plaintiffs have not shown that the documents were unavailable or that their absence leaves any gap in the administrative record. In sum, as to the Court's receiving these documents, Plaintiffs have failed to rebut the presumption in favor of foreclosing additional evidence.

III. Conclusion

For all of the above reasons, the Court **DENIES** Plaintiffs' motion to supplement the administrative record (Doc. 148).

IT IS SO ORDERED.

DATED this 12th day of June, 2008

s/Michael J. Reagan

ADVOCACY COMMISSION
John H. Wank, Acting Director

HUMAN RIGHTS AUTHORITY
LEGAL ADVOCACY SERVICE
OFFICE OF STATE GUARDIAN

November 25, 2003

Glenna Loch
5 Goldenrod Lane
Edwardsville, Il 62025

Case #04-070-9004

Dear Ms. Loch:

The Human Rights Authority (HRA) of the Illinois Guardianship and Advocacy Commission has completed its investigation of allegations of rights violations at Edwardsville High School and the case has been closed.

Enclosed are the HRA's report of findings and the school's response. The report was not changed as requested by the school, however, their response was made a part of the public record.

Thank you for having contacted the HRA and if you have any comments or questions, please call the HRA Coordinator, Michael J. Pintar at 474-5503.

Very truly,

s/Emil Wilson, HRA Chairperson
enclosures

METRO EAST REGIONAL HUMAN RIGHTS

AUTHORITY
REPORT OF FINDINGS
HRA CASE # 04-070-9004
EDWARDSVILLE HIGH SCHOOL
SEPTEMBER 11, 2003

INTRODUCTION

The Metro East Regional Human Rights Authority (HRA) has completed its investigation of a complaint regarding a student's 504 Plan at Edwardsville High School, a public high school. The allegation being investigated is that the school may have violated the rights of a student when it did not provide an appropriate and timely 504 plan. If substantiated, the allegation would be a violation of Rehabilitation Act of 1973, (Section 504).

Specifically, the allegation states that Edwardsville High School violated the rights of a student with disabilities when it did not provide or agree to an appropriate 504 plan as had been the school's past practice. Also, the school reportedly did not ensure that the plan was shared with all appropriate school staff.

METHODOLOGY

To investigate the complaint an HRA Investigative Team visited the school and interviewed the Director of 504 Plans (Director), and with consent, reviewed sections of the student's record. The Director provided the HRA with copies of the school's policy and procedures regarding 504 plans. The Authority reviewed a previously approved 504 plan and applicable sections of the Rehabilitation

Act. The student's parents were also interviewed.

FINDINGS

The student qualifies for 504 services because she has Type 1 diabetes. Persons with Type 1 diabetes may experience a "low" which causes a diabetic to feel weak, drowsy, confused, hungry, and dizzy. Paleness, headache, irritability, trembling, sweating, rapid heartbeat, and a cold, clammy feeling are also signs of low blood sugar. In severe cases, a person can lose consciousness and even lapse into a coma.

According to the allegations in September, 2002, an Edwardsville High School vice-principal, who was also the 504 Coordinator, reportedly accepted a 504 Plan written by the student's parents. In February and March 2003, several incidents occurred, and it was believed that some teachers were either not aware of the plan or did not adhere to the plan. When the concerns were brought to the Principal, he stated that a new 504 Plan Coordinator was assigned to the student. The new Coordinator told the parents that they could not write the 504 plan. A meeting was scheduled and the parents asked that teachers, the nurse, hall monitors and administrators be included in the meeting. At the scheduled meeting, the new 504 Plan Coordinator allegedly repeated that the parents could not write a 504 plan and that a new plan would be developed by school staff.

There were allegedly two significant incidents when school officials acted inappropriately. On one occasion, a teacher "got short and displayed anger" toward the student when she told the teacher that

she was experiencing a low and asked permission to go to the nurse's station. During the second incident, the student was allegedly experiencing a low sugar level during physical education class, and she requested to see the nurse. The teacher asked the student to explain her illness and when he finally allowed her to go to the nurse, he would not allow her assigned buddy to go with her.

The school reportedly did not allow the student to be accompanied by a buddy to the nurse's office when experiencing "lows," and not all school staff were informed of the student's condition and did not take appropriate action when the student explained that she was experiencing problems because of the diabetes. Also, it is believed that the school's staff may not have considered the student's condition when it reduced her grades and based them on attendance and not performance. The staff may not have considered the student's needs per the 504 plan when issuing detentions and not allowing for bathroom passes.

The Director stated that all teachers receive a confidential list of the students who have 504 plans and that teachers receive in-service training about the various medical conditions that students have and how to deal with them. The in-service education is provided by the school nurse. The HRA did not confirm these documents.

The Director stated that the 504 plan written by the family was flawed. Although the student preformed exceptionally well scholastically, concerns arose last school year (2002-2003) when the student had excessive absenteeism. The record

revealed that the student was late for school eleven times, absent twenty-six days and that she only visited the nurse's station three times the entire year. The Director explained that there was concern of accountability regarding tardiness and attendance, and the fact that the student rarely needed to see the school nurse. Also, the school was apprehensive about the fact that the 504 plan did not allow the school nurse to correspond with the student's doctor. The school asked the parents to sign a consent to release information that would allow the school nurse to contact the student's doctor and include him in the development of the 504 plan. The Director stated that the parents refused to consent to that exchange of information.

The Director stated that the plan presented by the parents was inappropriate because it stated that 1. the family could choose the student's teachers, 2. the student could eat when she wants to eat, 3. that the student shall not be disciplined. The Director stated that the plan developed by the student's parents was not reasonable and that the school could not adhere to it.

When asked about the two incidents that occurred during the past school year, the Director stated that she was aware of the incidents and that when they were brought to the school's attention, the school reacted by having the building Principal conduct an investigation.

Regarding the incident when a teacher did not allow the student to be dismissed to go to the bathroom, the student had arrived for school late and then requested to go to the bathroom. For that

reason, the teacher questioned the need of the student to leave the classroom. The second incident occurred because there were about three hundred students in the physical education class, and the student teacher that the student approached for permission was not aware that the student might have a legitimate reason to see the nurse. The Director stated that the student was allowed to leave the classroom and she was seen by the nurse at that time.

The HRA asked the Director about the meetings that took place last April and the scheduled meeting to develop this year's 504 Plan. The Director stated that the meeting held last April was about the student's brother and, at that meeting, the subject of the student's 504 Plan was discussed. The Director stated that she told the family that a new plan would be developed by the school, however, until that time, the current plan would be honored.

The Director told the HRA that, during the 2002 – 2003 school year, the school adhered to the plan that was accepted by the by the vice-principal in the fall of 2002. However, it is the school's position that plans are to be written by the school with input from the student, family and other appropriate parties. She acknowledged that incidents occurred and that the student and her family's perception was that the plan was not adhered to on those occasions. The Director discussed these incidents with the teachers involved and there was disagreement between the student's and teacher's recollections of the incidents. The director stated that those type of

incidents of misunderstanding will occur and the school's goal is to ensure that teachers are informed and trained about 504 plans and that those plans are executed.

The Director stated that the school intended to have a new plan developed in the near future and that a meeting would be held with the student, her family and the appropriate school staff.

The HRA reviewed the 504 plan developed by the parents, which states in part:

> The following education plan and summary has been put together for [name of student] by her parents and treating physician. ...student has Type 1 Juvenile Diabetes and, as a result, requires Section 504 considerations, which will be as follows:
>
> Class schedules, teachers and class times will be arranged by [the student's] parents and school counselor.
>
> The Nurse's office will provide space, time and supervision for glucose monitoring at the school. Diabetic supplies will be held in storage in the Nurse's office....
>
> School Nurse will do a "in-service session" on Type 1 diabetes with school staff, hall and security monitors with respect to symptoms, accommodations, and the treatment of Type 1 diabetes.
>
> Have an emergency plan available for the

staff to follow.

Have a buddy system available for [name of student] when she is going to the nurse's office while suffering from a low sugar situation.

All of [name of student's] teachers must be in attendance for Section 504 meetings....

PROCEDURES

The Edwardsville Community Schools 504 procedure states in part:

> If a student is eligible for a 504 plan, reasonable accommodations are written using the 504/ADA accommodation plan form. Examples of some types of academic adjustments and auxiliary aids/ supports/accommodations which may be necessary are; course modifications, course examination modifications extension of time to complete assignments..., medication administration and other non-special education interventions as deemed necessary to provide the student with a 'free appropriate public education.'
>
> The section 504 regulation provides that a recipient make modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate...
>
> Each Principal shall maintain a list of

students in their buildings with 504 plans . .

The 504 Plan will follow the student to the receiving school until modified ...

Each Student's 504 Plan should be reviewed and updated annually (by October 1) of each year. ..

All staff members working with the student should attend the annual review /reevaluation....

The parents will be provided notice, in writing, of the date and time of any meetings held where eligibility and/or accommodations are determined.

The 504 rules contain two forms, an evaluation form and a 504 Plan form.

REHABILITATION ACT

Section 504 of the Rehabilitation Act of 1973 is a national law that protects *qualified* individuals from discrimination based on their disability.

The Rehabilitation Act Section 104.33 states in part:

(a) General. A recipient that operates a public elementary or secondary educational program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap. . .

104.44 states in part:

(a) Academic requirements. A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. . .

After reviewing the 504 rules, the HRA determined that the procedural guide developed by the school met the requirements of the Act.

CONCLUSION

Based on the facts gathered, the allegation that the school violated the rights of a student when it did not provide an appropriate 504 plan is substantiated. That is, the evidence revealed that the school did not follow its procedure in the fall of 2002 when it accepted the 504 plan written by the parents without having conducted a meeting or completing its required forms. That 504 Plan did not follow the Edwardsville Community School District #7 Form 504/ADA Accommodation Plan requirements. The allegation that the plan was not timely is not substantiated.

RECOMMENDATIONS

The HRA recommends that Edwardsville High School adhere to its Procedure and convene a meeting with the family. The School should ensure

that it gives written notice to the family about meetings to determine accommodations, adheres to the 504 regulations, makes modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate. . . and that all staff members working with the student attend the annual review/reevaluations. The resulting plan should be developed utilizing the school's evaluation and 504 Accommodation Plan format.

October 14, 2003

Emil Wilson, Chairman
Regional Human Rights Authority
4500 College Avenue, Suite 100
Alton, IL 62002-5051

Dear Mr. Wilson:

In the conclusion, on page 5 of the report of findings documents, we would request that the following be inserted.

Based on the facts gathered, the allegation that the school violated the rights of the student when it did not provide an appropriate plan *in accordance with its own policies and procedures* is substantiated.

At the start of this school year, all of the administrative staff were inserviced on Section 504 procedures contained in Edwardsville District 7 Board Policy and District Administrative Procedures. Further, a meeting was held with the family and a new plan written utilizing the district procedures and forms and distributed to all teachers within the student's schedule.

Sincerely,

s/Norm Bohnenstiehl, Principal
Edwardsville High School

Cc: Rebecca Kolda, 504 District Coordinator

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS Filed 5/18/2007

THOMAS H. LOCH, GLENNA H. LOCH and KAYLA N. LOCH	)
	)
Plaintiffs,	)
	)
v.	)
	)**Civil**
	)**ActionNo.**
	)**3:06-cv-17-**
	)**MJR**
	)
BOARD OF EDUCATION OF EDWARDSVILLE COMMUNITY SCHOOL DISTRICT #7,	)
	)
Defendant.	)

MEMORANDUM AND ORDER

REAGAN, District Judge:

Defendant, Board of Education of Edwardsville Community Unit School District No. 7 ("District"), moves the Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedures, to dismiss a portion of Counts I, V and VII, and all of Counts II, III, IV, VI, VII, IX and X of the Amended Complaint (Doc. 48).[17]

[17] Plaintiffs have attached exhibits to their responses to Defendant's motion to dismiss. However, consideration of

This case presents a host of claims and issues concerning the education of Plaintiff Kayla Loch ("Kayla"), who is now an adult.[18] At the core of this action are claims arising under the Individual with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq.*, although Plaintiffs have also brought claims pursuant to 42 U.S.C. § 1983, the American with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. §§ 794 *et seq.*, the Civil Rights Restoration Act of 1987 ("CRRA"), Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000d, et seq., and Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*

Kayla alleges that the District, inter alia, failed to evaluate her in a timely manner, refused to honor dual credit courses and discriminated against Kayla on the basis of sex, Plaintiffs, Thomas and Glenna ("Thomas and Glenna"), Kayla's parents, allege that the District violated the procedural requirements of the IDEA, retaliated and discriminated against them for having filed a complaint with the Human Rights Authority; and deprived Kayla of a free appropriate public education ("FAPE").

---

matters outside the pleadings without allowing opposing litigants to supplement the record constitutes error. *See Carter v. Stanton*, 405 U.S. 669, 671 (1972) (*per curiam*). Accordingly, the Court will not consider Plaintiffs' exhibits unless it finds that they are referenced in Plaintiffs' amended complaint and are central to their claim. *See Venture Associates v. Zenith Data Systems*, 978 F.2d 429, 431 (7th Cir. 1993).

[18] To avoid confusion, the Court will refer to Plaintiffs by their given names, Kayla, Thomas and Glenna where appropriate.

I. Background

At the time that Plaintiffs filed their amended complaint, Kayla was an eighteen-year old student who attended Edwardsville Community Unit School District No. 7. Kayla was ten when she was diagnosed with juvenile diabetes and fourteen when she was diagnosed with emotional disabilities. After Kayla was diagnosed with diabetes, the school district developed a plan for accommodating her disability under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (commonly known as a "504 plan"). Although Kayla began to miss school regularly, she maintained good grades, and teachers continued to rate her social development well. Her attendance record eroded further in eighth and ninth grades and the first semester of tenth grade, but she still kept up with her work and performed well.

Plaintiffs allege that, beginning with her freshman year at Edwardsville High School ("EHS"), school staff failed to follow the 504 Plan written for Kayla did not conduct meetings with her instructors to cover her 504 Plan formally. As a result, EHS staff and instructors did not accommodate her, as noted in her 504 Plan, such as not allowing her to receive full credit for late or make-up work. As a result of the difficulties Kayla had with her 504 Plan, Thomas and Glenna filed a complaint with the Human Rights Authority of the Illinois Guardianship and Advocacy Commission ("HRA"). The HRA concluded that EHS violated Kayla's rights in the fall of 2002 when it failed to follow appropriate procedures.

In March, 2004, during the second semester of her sophomore year, Kayla stopped attending

classes at EHS and began to attend Lewis and Clark Community College ("LCCC"). Plaintiffs claim that they took this step because EHS's failure to accommodate her disability. EHS was not aware of the reason Kayla stopped attending or completing her work; she failed most of her classes that semester, and her enrollment was eventually dropped.

In July, 2004, Plaintiffs met with the principal of EHS and presented a proposed plan for Kayla's schooling in the next academic year. The proposal specified that Kayla was to remain registered at EHS but would take all of her classes at LCCC, for which would receive credit toward graduation from EHS. The principal stated the school board guidelines did not allow such an arrangement but that he and the assistant superintendent for curriculum would work with Plaintiffs to devise an appropriate plan for Kayla's continued education at EHS. Shortly thereafter, Thomas requested an evaluation under the IDEA to determine whether Kayla was eligible for special education. School officials conducted a series of tests, including the typical battery of tests for evaluation adolescent function and environmental adjustment. They also met with Kayla's therapist, psychiatrist and pediatric endocrinologist. Later, the testing team and school administrators met with Thomas and Glenna to discuss the results. Kayla's intellectual and psychological functioning were well within the normal category, but on her Behavior Rating Scale, the "School Maladjustment" domain categorized her as "at risk." The meeting also dealt with Kayla's conflicts with her teachers over her diabetes accommodations and her social conflicts with other students. The meeting resulted

in a finding that Kayla was not in need of special education services.

Thomas disagreed with the finding, asked for a Section 504 meeting, and reiterated his request that Kayla receive EHS credit for taking LCCC classes. This request was again denied, and Plaintiffs were told a Section 504 meeting could be scheduled when Kayla re-enrolled at EHS. After their request were denied, Plaintiffs submitted a request for a due process hearing. The hearing did not result in a change in Kayla's status or her eligibility for special education. Plaintiffs could not obtain the accommodations that they sought, and this lawsuit followed.

II. Applicable Legal Standard

The District moves for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, which governs dismissal for failure to state a claim. In assessing a Rule 12(b)(6) motion, the Court must take as true all factual allegations and construe in plaintiff's favor all reasonable inferences. ***Massey v. Merrill Lynch & Co., Inc.*** **464 F.3d 642, 656 (7th Cir.2006);** ***Albany Bank & Trust Co. v. Exxon Mobil Corp.,*** **310 F.3d 969, 971 (7th Cir.2002).**

A complaint should be dismissed only, "if there is not set of facts, even hypothesized, that could entitle a plaintiff to relief." ***Massey,*** **464 F.3d at 656**. As the United States Court of Appeals for the Seventh Circuit explained:

"We construe the complaint in the light most favorable to the plaintiff, taking as true all well-pleaded factual allegations and making all

possible inferences from those allegations in his or her favor." ***Barnes v. Briley,* 420 F.3d 673, 677 (7th Cir. 2005).** Dismissal is proper "only if it 'appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*

***McGready v. EBay, Inc.*, 453 F.3d 882, 887 (7th Cir.2006).**

Indeed, the law of this Circuit recognizes that, generally, "a party need not plead much to survive a motion to dismiss" – not specific facts, not legal theories, and not anything in anticipation of a possible defense. ***Massey, 464 F.3d at 650 (citing Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901-02 (7th Cir.2004)).** The gist of this Court's inquiry is "whether the complaint gives the defendant fair notice of what the suit is about and the grounds on which it rests." ***Mosely v. Board of Educ. of City of Chicago*, 434 F.3d 527, 533 (7th Cir. 2006).** ***See also Swierkiewicz v. Sorema N.A.*, 506, 508 (2002) (complaints need not allege facts; they need only present a claim for relief).**

III. Analysis

The District argues that it is entitled to dismissal of certain counts and portions of counts on the following grounds: 1) failure to exhaust administrative remedies; 2) failure to state a discrimination claim under Title VI; 3) failure to state a claim under 42 U.S.C. § 1983 that the District acted recklessly, with callous indifference or that the District has a custom or practice of

denying or refusing services under the IDEA; 4) failure to state a claim regarding prior written notice under the IDEA; and 5) Thomas and Glenna lack standing to pursue claims under the IDEA. The Court will address the District's arguments in turn.

A. Exhaustion of administrative remedies (Counts I, II, VI and IX)

It is undisputed that any parent or student who seeks relief available under the IDEA must exhaust administrative remedies prior to filing a civil action. See 20 U.S.C. § 1415(l); *Charlie F. v. Board of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989 (7th Cir. 1996). Exhaustion of remedies is also required for claims asserted under Section 504 and the ADA where a parent or student seeks relief under the IDEA. *Charlie F.*, 98 F.3d at 991-92. Only those issues raised before the administrative hearing officer satisfy the exhaustion requirement. *Kerry M. v. Manhattan Sch. Dist. No. 114*, 2004 WL 2538303, at 8* (N.D.Ill. 2004). Each IDEA allegation must be exhausted individually. *Id.*

The District contends that five issues raised in Plaintiffs' amended complaint were not raised before the hearing officer: 1) the district's "evaluation process was largely inadequate nor was it a complete and objective evaluation . . . Only the BASC was used, despite an "at risk" score indicating that a serious problem existed with the educational setting and the school's teachers and administrators;" 2) the district "failed to consider Kayla's educational performance"; 3) the district "failed to consider Kayla's excessive absenteeism and the affect (sic) it was having on her educational

development"; 4) the district "failed to consider Kayla's parents (sic) input"; and 5) the district "failed to consider Kayla's health care providers (sic) findings." Plaintiffs contend that they have met the exhaustion requirement and that all issues were properly raised before the hearing officer.

The Court finds that a motion to dismiss is a singularly inappropriate time to resolve this sort of "he said she said" dispute. ***See Russell v. Board of Trustees of the University of Illinois at Chicago,*** **243 F.3d 336, 340 (7th Cir. 2001).** Accordingly, the Court will deny the District's motion to dismiss as to exhaustion of remedies.

B. Sex discrimination (Count III)

The District asserts that Kayla's sex discrimination claim set forth in Count III should be dismissed. The District asserts that Title VI of the Civil Rights Act does not prohibit discrimination based on sex or disability and that Kayla cannot prove a prima facie case of sex discrimination under Title IX or the American with Disabilities Act ("ADA"). Kayla counters that Title IX prohibits sex discrimination by recipients of federal education funding, such as EHS. Kayla asserts that the acceptance of "dual credit" college work by the District is approved on a case-by-case basis and, as practiced, favors male students, specifically male student athletes.

The District is correct that Title VI of the Civil Rights Act prohibits discrimination on the basis of race, color or national origin by programs or activities receiving federal financial assistance. **42 U.S.C. §2000d;** ***see New York City Jaycees, Inc. v. U.S. Jaycees, Inc.,*** **377 F. Supp. 481**

(D.C.N.Y.1974), *reversed on other grounds* 512 F.2d 856 (holding that Title VI does not bar sex discrimination). Therefore, Kayla's claim of discrimination on the basis of sex or disability may not be brought under Title VI. The Court will dismiss portion of Count III that makes a claim under Title VI.

Title IX provides for the redress of sex discrimination at federally-funded institutions. Education Amendments of 1972, § 901, 20 U.S.C. § 1681; *Boulahanis v. Board of Regents*, 198 F.3d 633, 640-41 (7th Cir. 1999). Kayla alleges that she was discriminated against on the basis of sex where she was denied access to educational opportunities offered to male students and, more specifically, to male athletes. Kayla need not allege facts, as the District suggests, but need only present a claim for relief. *See Swierkiewicz*, 534 U.S. at 508. As such, Kayla has sufficiently alleged that the District denied her educational benefits based on her gender to withstand the District's motion to dismiss at to this issue.

The American with Disabilities Act provides as follows: "Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. Thus, the ADA prohibits discrimination "by reason of [a] disability" and does not prohibit discrimination based on sex. Therefore, Kayla's claim of discrimination on the basis of sex may not be brought under the ADA. The Court will dismiss that portion of Count III

that makes a claim under the ADA.

For the above-stated reasons, Court will dismiss Kayla's claims in Count III only as to her claims brought under Title VI and the ADA.

C. Section 1983 claims (Counts IV, VII and X)

Stated simply, a § 1983 claim requires the plaintiff to allege that a state actor deprived him of a federally-secured right. ***Mosely v. Board of Educ. of City of Chicago,* 434 F.3d 527, 533 (7th Cir. 2006); *see also Neuman v. McCoy,* 210 Fed. Appx. 542, 2006 WL 3804383 (7th Cir. 2006) (unpublished) (Section 1983 requires that the defendant's action, or inaction, deprived the plaintiff of a right secured by federal laws or the federal constitution.).** Furthermore, to state a claim under § 1983, Plaintiffs must allege that the District ". . . has committed a legal violation pursuant to a 'custom' or with reckless or callous indifference. . ." ***Monticello School Dist. No. 25 v. George L. on Behalf of Brock L.,* 102 F.3d 895, 903 (7th Cir. 1996).** The Court stated that when there was ". . . no allegation in the record, including the [ ] complaint, that the School District has a custom to deny or refuse services under the IDEA or § 504 or that the School District has acted recklessly or with callous indifference, those bases for a § 1983 violation are simply unavailing." ***Id.***

In Counts IV, VII and X, Plaintiffs incorporate by reference their general allegations. Therein, Plaintiffs allege that the District failed to follow its own procedures in implementing Kayla's 504 Plan. Because staff and instructors were not made aware that Kayla was a diabetic student and

had "accommodations" noted in her 504 Plan, she was not allowed to receive full credit for late or make-up work. In one instance, an instructor, who had not been made aware of her diabetic condition, refused to allow her to leave class to see the school nurse when her blood sugar was dangerously low and would not allow a "buddy" to accompany her although that accommodation was part of her Plan. Plaintiffs also allege that the District has a policy of not allowing access to tight glucose control which could significantly reduce disease complications and assist diabetic students in educational performance, self-esteem and self confidence.

The Court finds that Plaintiffs have adequately alleged facts which could entitle them to relief under § 1983 and that dismissal of the Counts on this basis is not appropriate.

D. Written notice to parents (Counts V and VIII, B(e)-(g))

The IDEA requires that school districts provide prior written notice to parents at certain certain times, as follows:

3) Written prior notice to the parents of the child, in accordance with subsection(c)(1) of this section, whenever the local educational agency—

(A) proposes to initiate or change; or

(B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

In Counts V and VII, claims B (e) through(g), Glenna and Thomas allege that the District had a responsibility to follow "procedural requirements" with respect to parental rights by providing written notice prior to expelling Kayla during the pendency of due process proceedings, by providing procedures concerning placement when notified that Kayla was attending LCCC or by following up with Thomas and Glenna when they sent Kayla to LCCC.

The District contends that is not required, under the IDEA, to provide written notice on these three specific issues. The District provides no case law in support of its position, and the Court does not read the IDEA provisions at issue as narrowly as the District proposes. Surely, expelling Kayla during the pendency of due process proceedings falls within the realm of changing her placement or the provision of FAPE. Moreover, because the District allegedly allows some students "dual credit" for course work at LCCC, refusing to allow Kayla to participate in this program could constitute refusing to change her educational placement. For these reasons, the Court will deny the District's motion as to written notice.

E. Lack of standing (Counts VII and X)

The District asserts that Thomas and Glenna lack standing to assert claims under the IDEA and implementing regulations because their rights transferred to Kayla when she reached the age of majority. In Counts VII and X, Thomas and Glenna claim, pursuant to § 1983, that they were deprived of federally-secured rights when Kayla was denied FAPE.

The IDEA expressly grants a private right of action to parents for violation of the procedural safeguards of the IDEA. **20 U.S.C. § 1415(f),(g) and (i); Honig v. Doe, 484 U.S. 305, 312 (1988).** The actions Plaintiffs allege against the District violate the rights of both parents and child under the IDEA. However, the IDEA provides that a state "may provide that, when a child with a disability reaches the age of majority . . . all other rights accorded to parents under this subchapter transfer to the child." **20 U.S.C. § 1415(m)(1).** Illinois has so provided. Title 23 of the Illinois Administrative Code provides, in relevant part, as follows:

> a) When a student with a disability reaches the age of majority (18 years of age; see 755 ILCS 5/11-1) . . . [t]he school district shall provide any notice required by this Part to both the individual and the parents, and all other rights accorded to parents under Part B of the Individual with Disabilities Education Act, the implementing regulations at 34 C.F.R. 300, and this Part shall transfer to the student: . . . **23 IL ADC 226.690.**

Because there has been no showing that Kayla is incompetent or otherwise incapable of asserting her own legal interests, Thomas and Glenna lack standing under the IDEA to bring suit as parents on Kayla's behalf. ***See, e.g. Weyrick v. New Albany-Floyd County Consolidated School Corp.,* *4 (S.D.Ind.2004) (finding that parent lacked standing under the IDEA to bring suit on behalf of adult son where parent alleged that the defendants ". . .failed to identify and**

evaluate [the son] regarding his need of special education services, failed to provide him with an IEP, and failed to convene required case conferences."). Accordingly, the Court will dismiss Counts VII and X of Plaintiffs' complaint.

IV. Conclusion

Accordingly, for the above-stated reasons, the Court **GRANTS in part and DENIES in part** Defendant's Motion to Dismiss Amended Complaint (Doc. 48), as follows:

1) Defendant's motion to dismiss Counts I, II, VI, and IX for failure to exhaust administrative remedies is **DENIED**;

2) Defendant's motion to dismiss Count III, regarding Kayla's claims of sex discrimination, is **GRANTED** as to Plaintiff's claims brought pursuant to Title VI and the ADA and **DENIED** as to other stated causes of action.

3) Defendant's motion to dismiss Count IV, regarding Kayla's § 1983 claims, is **DENIED**;

4) Defendant's motion to dismiss Counts V and VIII, B(e)-(g)) regarding written notice to parents is **DENIED**; and

5) Defendant's motion to dismiss the claims of Thomas and Glenna, Counts VII and X, for lack of standing is **GRANTED**.

IT IS SO ORDERED.

DATED this 18th day of May, 2007

s/Michael J. Reagan
MICHAEL J. REAGAN
United States District Judge

ILLINOIS STATE BOARD OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

IN THE MATTER OF: KAYLA L.
Case No. 004400

EDWARDSVILLE COMMUNITY
UNIT SCHOOL DISTRICT 7

Gail Friedman – Impartial Hearing Officer

DECISION AND ORDER

Introduction:

The above-entitled matter came on for hearing before the hearing officer commencing on May 18, 2005, and continuing on May 19, July 13 and 14, August 31, and September 1, 2005, at the Edwardsville Community Unit School District 7 Administrative Offices located at 708 St. Louis Street, Edwardsville, Illinois. This case arises from a request by the parents on behalf of student for a due process hearing concerning student's eligibility for special education and related services and compensation for a unilateral placement. The hearing officer has jurisdiction to hear and decide this matter under Section 14-8.02 of the Illinois School Code (105 ILCS 5/14-8.02), the Individuals with Disabilities Education Act, as amended, 20 U.S.C. 1400 et seq. (IDEA) and 34 C.F.R. 300.506-509; and 23 Ill. Admin. Code 226 Subpart J. Throughout the proceeding district was represented by counsel.. Parents appeared pro se. The hearing

was closed to the public. The parties were informed of their rights under Section 14-8.02(g) of the Illinois School Code (105 ILCS 5/14-8.02(g)), the IDEA, 34 CFR 300.509, and 23 Ill. Admin. Code 226 Subpart J.

Procedural History:

Father requested this hearing on behalf of his daughter in a letter dated February 2, 2005, which was received by the district on February 7, 2005. The Illinois State Board of Education ("ISBE") received the request form from the district on February 14, 2005. On February 16, 2005, the hearing officer received her appointment in a letter from the ISBE dated February 14, 2005. On February 16, 2005, the hearing officer took immediate steps to. . .contact the parties. Father stated that he was interested in mediation. On March 2, 2005, the district informed the hearing officer that the parents were no longer interested in participating in mediation. In a letter dated March 24, 2005, the hearing officer notified the parties that the pre-hearing conference was scheduled for April 1, 2005, at 10:00 a.m. and would take place by telecommunication. During the pre-hearing conference father requested a closed hearing and stated that the student would be present at the hearing and could be a potential witness. The parties agreed to set the hearing for May 18 and 19, 2005. If additional hearing dates were needed for hearing, further dates would be set by agreement of the parties. Documents and a final witness list were to be exchanged by May 11, 2005. On April 13, 2005, the hearing officer sent letters to the parties summarizing the results of the pre-

hearing conference held on April 1, 2005, and giving information regarding the hearing upcoming due process hearing.

On May 18, 2005, the hearing convened and continued on May 19, 2005. Insufficient hearing days were originally scheduled for the hearing, which necessitated continuing the case, by agreement of the parties, to July 13 and 14, August 31, and September 1, 2005. Student and parents were represented throughout the proceeding by student's father, who is not a lawyer. On July 13, 2005, the hearing officer objected to the father's repeated questioning of witnesses regarding procedural violations by the district explaining to the father that procedural violations were not presented as an issue at the pre-hearing conference on April 1, 2005, or any other time prior to the start of the hearing. Father argued that it was his understanding that procedural violations were included in all of the issues he had listed for the April 1, 2005, pre-hearing conference and that he had mentioned them in his opening statement at the beginning of the hearing. Over the objection of the district's attorney, the hearing officer allowed father to submit a written list of procedural violations by the district on July 14, 2005. At the conclusion of the hearing on September 1, 2005, the hearing officer apprised the father that parents' list of documents would be revised to include only those documents that had been presented during the hearing. In addition, father was told that he could go through the district's documents and request that documents not referred to by the district during the hearing be deleted from the district's documents. Father insisted that going through district's documents was too onerous a task and

that he wanted the hearing officer to accept all of parents' documents into evidence whether they were referred to during the proceedings or not. The hearing officer denied the father's request to accept into evidence those documents not referred to during the hearing. In support of the ruling, the hearing officer referred father to the Number 9 of the pre-hearing conference summary dated April 13, 2005, which states "the documents are to be given to the hearing officer at the start of the hearing," and paragraph 2 of the due process hearing information letter dated April 13, 2005, which states *"for the purposes of the hearing I will only consider as part of the record those documents entered into the record during the hearing by either of the parties."*

Statement of the Issues:

Parents' Issues:

As of the April 1, 2005, pre-hearing conference the issues were as follows:

1. Whether the district's review and determination of eligibility was correct?
2. Whether the eligibility determination was timely made?
3. Whether parents are entitled to reimbursement for student's unilateral placement at the community college?
4. Whether student should be found eligible under emotional disturbance for failure of the school district to follow student's 504 plan?

Over the objection of the district, on July 14,

2005, the following issues were added pertaining to procedural violations:

1. Whether the district provided written notice pursuant to 20 U.S.C. 1415(b)(3) and (c) within a reasonable time to parents prior to proposing, or refusing to initiate, or change the identification, evaluation, placement or provision of a free appropriate public education?

2. Whether the district provided prior written notice of the evaluations which the district conducted with respect to the case study evaluation?

3. Whether the district provided parents with information on specific procedures required for pursuing a referral?

4. Whether the district provided procedures for presenting complaints?

5. Whether the district was required to provide prior written notice prior to expelling student from school rolls during pendency of due process proceeding?

5. Whether the district was required to provide procedures or written notice concerning the placement determination made by parents when notified by parents?

6. Whether the district provided procedures, written notice/follow-up concerning the placement determination when notified?

7. Whether the district complied with requirements for disclosure of evaluation results and recommendations provided by district personnel?

Findings of Fact:

Student is a seventeen-year old female who resides in the district. Student is currently enrolled in a local community college. According to the Social Developmental Study Summary completed on January 14, 2005, in fourth grade, student was diagnosed with diabetes mellitus type 1. At that time, a 504 plan was established. Prior to this time, student received satisfactory marks and missed less than four days in any quarter. During student's 4th and 5th grades, student's attendance started to decline somewhat. While in 4th grade, student missed 45 days,; in 5th grade, 27 days; 6th grade 31, day; and 7th grade, 46 days. During all the years mentioned, student maintained grades of A's, B's, and a few C's. Teachers continued to rate her behavior, socialization, organization, and work habits as excellent or at least satisfactory. In 8th grade student missed over 67.5 days of school. Notes on student's transcript stated "fails to make up missed work" and "attendance needs improvement." Student began her freshman year at Edwardsville High Schoo ("EHS") in August 2002. Although absent 76 days in her freshman year, student made the 9th grade regular honor roll (Parents' Exhibit, ("PE") 29) Even though student was absent a great deal during the first semester of her sophomore year, student continued to turn in her work and perform well in her classes. In March, 2004, student stopped attending classes at EHS. Student received grades of D and F for the second semester of her sophomore year. In July, 2004, student's father met with EHS principal and presented an academic plan for student's 2004-2005 school year. Father notified the principal that student would be attending the local community college for the next semester and that he wanted

her to receive credit towards graduation at EHS for the courses take at the college. Student's father was told that his plan needed to be presented in writing. On August 23, 2004, student's father wrote a letter to EHS principal outlining the plan. Student was to attend the local community college as a full time student and receive credit toward he EHS class requirements. Student would still be registered as an active EHS student; however, her attendance would be exclusively through the community college. On September 3, 2004, student's father met with EHS principal and the assistant superintendent of the district for curriculum. At that meeting, parent again requested a "permission letter" to allow student to attend the local community college exclusively and receive credits toward her high school diploma at EHS. On September 16, 2004, the assistant superintendent of curriculum wrote to student's father that while the district was prepared to work with him to provide an appropriate educational program for student at EHS, the district could not provide permission for student to attend the community college in lieu of attending EHS. (PE 67) In addition included with the letter was a copy of *A Parent's Guide: The Educational Rights of Parents of Students with Disabilities* since during her meeting with father there had been a discussion regarding outside placements for students with individualized education programs ("IEP"). Father wrote to the EHS principal on September 18, 2004, requesting a special education evaluation under IDEA. A collaborative team meeting was scheduled for October 15, 2004, to discuss father's request and 504 programming for student. (School District Documents ("SDD") A 75)

Father was present at the meeting. According to the notes of the meeting, student's father objected to the notification he received as to the purpose of the meeting. Father insisted that a correction be made to the notice in writing prior to the start of the meeting stating that the purpose of the meeting was for IDEA eligibility. When the staff did not readily comply, student's father would not continue. In addition, father was asked to revoke the continuation of the 504 plan in writing, but he refused. (SDD A 77-78) A new collaborative team meeting was scheduled for October 29, 2004, to discuss father's request for a case study evaluation. (SDD A 80) At that meeting father signed a consent for evaluation (SDD A82a), and the team identified the needed assessments. (SDD A82b) The team determined that student should be evaluated in the areas of health, vision, hearing, social/emotional status, and academic performance.

On January 18, 2005, an IEP meeting was held to determine student's eligibility for special education and related services. The team reviewed student's current academic function, communication status, general intelligence standardized achievement, motor abilities, social emotional status, and health /hearing/vision.(SDD, A 148a) Parents were present at the meeting. The results of the Case Study Evaluation were shared by the nurse, school psychologist, and social worker. Several standardized tests had been administered, including the Wechsler Adult Intelligence Scale –III, Beery Developmental Test of Visual Motor Integration, the Wechsler Individual Achievement Test-II, and the BASC completed by student and mother, and the results

of those were shared with the team as well. Information from student's therapist and psychiatrist were presented by the director of special education and reviewed. Student had not been to the psychiatrist since July 22, 20004. At that time no medications were prescribed and student denied all symptoms. Student's therapist had not seen student since October, 2004, but the therapist reported that student was much happier attending the community college rather than EHS. (SDD A142-A144a) The nurse provided information on student's physical condition and shared a letter dated September 4, 2003, from student's pediatric endocrinologist stated "diabetes mellitus type 1 under good control is not a reason for excessive absenteeism and tardiness, although complications such as mild depression, stress, or physical complications may lead to functional impairments. Teenagers with diabetes who manage their insulin, diet, blood sugars and physical activity are expected to be able to function at the level of non-diabetic peers. The psychological evaluation noted that student's global intellectual capacity measured within the normal range of ability. A Behavior Rating Scale indicated adequate levels of adjustment in all areas except Attitude towards Teachers under the School Maladjustment domain, which indicated a slight elevation falling within the At Risk category. (SDD A137) The Social Developmental Study showed the only area of significant concern was student's attitude towards her teachers and school. During the interview, student's mother indicated that student had had conflicts with a few of her teacher's regarding measures that student must take in order to care for her diabetes. It appeared to the social worker

that the majority of the concerns were with new teachers or substitutes that were unfamiliar with student's 504 plan. Student's mother also stated that in February, 2004, student experienced some conflicts with peers due to teasing and inappropriate comments. The feelings of not being connected with school and her teachers combined with conflicts with -peers resulted in student becoming very resistant to attending EHS. In contrast forms filled out by student's teachers indicated that student had no problem interacting and relating with them or her peers. In addition, teachers reported that student when student was present in class she had no difficulty grasping the material and completing assignment. (SDD A 78a-78m) The request for consultation services form described student as smart and able to handle high school curriculum adequately when she was in attendance. (SDD AS1) The team further noted that no global disability existed across settings and that adverse effects appeared to be situational and not global. (SDD A148b) In addition, the team noted that the emotional issues student described did not seem to have an adverse effect on student's educational performance at the community college where for the first semester of the 2004-2005 school year student received three As and one. B, earning 10 hours of credit, and that the student's diabetes had not kept her from achieving. After sharing information, the team determined that student was not in need of special education services in order to progress educationally and therefore was not eligible for special education and related services. (SDD, A 154) Father indicated his disagreement with the rest of the team's determination. (SDD A 151) The district told parents that a 504 meeting

could be convened when student decided to enroll and attend EHS. Parents again indicated that they wanted an authorization letter from district allowing student to attend the community college and receive dual credit. This was denied. On February 3, 2005, parents submitted a request for a due process hearing to the district.

Conclusions of Law:

Parents argue that student qualifies for and is entitled to receive a free and appropriate public education ("FAPE") with special education and related services under the provisions of state and federal laws. The Individuals with Disabilities Education Act, 20 U.S.C. Section 1401, *et seq.*, 23 Ill. Adm. Code 226, Subpart J. Specifically, parents argue that student should be found eligible under the categories of other health impairment ("OHI") and/or emotional disturbance "ED") The district argues that student is not in need of specially designed instruction in order to progress academically and therefore is not eligible for special education and related services under OHI or ED. A "child with a disability" is defined under the federal law as "a child evaluated in accordance with Sec. 300.530-30.536 as having . . . serious emotional disturbance (hereafter referred to as emotional disturbance). . . an other health impairment. . . and who, by reason thereof , needs special education and related services." 34 C.F. R. 300.7(a)(1). *See also* IDEA Section 1401(a)(3).

OHI is defined in 34 C.F. R §300.7(c)(9) and 23 Ill. Adm. Code §:226.75 as:

Other health impairment means having limited strength, vitality or alertness, including a heightened alertness, including a heightened alertness with respect to the educational environment, that –

(i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic ever, sickle cell anemia; and

(ii) Adversely affects a child's educational performance.

It is clear that diabetes is a condition that may qualify a child for special education and related services, if, after conducting an educational evaluation pursuant to 34 C.F.R. §300.530-33.543 of the federal regulations, it is determined that the child requires special education and related services. *OSEP Letter,* 24 IDELR 853 (OSEP 4/596) (emphasis added)

Pursuant to 34 C.F.R. §300.7(c)(4) and 23 Ill. Adm. Code §226.75, emotional disturbance is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's education performance:

(A) An inability to learn that cannot be explained

by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relations with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with person or school problems.

(iii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.

Based upon the evidence presented, the district was correct in finding student ineligible for special education and related services. The school psychologist and nurse testified that according to student's medical records, student's diabetes was controlled. Nothing in the school records showed student had limited strength, vitality, or alertness due to her diabetes when she did attend school. Some of student's teachers testified that they had heard from student' mother that student had difficulty with her diabetes around her menstrual cycle. This still did not account for all of student's absences from school. One teacher stated that student might need to go to the bathroom to check

her blood sugar, but they did see this as a problem. The medical report dated June 18, 2003, reported that student had developed a disturbing sleep/wake pattern. Student stated that she was studying computers and corresponding via the internet with people in Europe and needed to be up in the middle of the night.(SDD A 97) The school psychologist stated that after reviewing all the information, she found nothing that would lead her to believe that student should have been found eligible. She did not see_any problems with student's diabetes that would require specialized instruction. The psychologist testified that student did not meet any of the criteria for emotional disturbance. She observed no adverse education effects. Even without being in the classroom most of the time, student could do make-up work on her own and successfully complete assignments .Student did not need specialized instruction. The school psychologist further testified that for eligibility there needed to be a finding of adverse effect. If the student needs. nothing other than regular education to be successful, the student is not found eligible. Eligibility if for those students who need special services to be successful.

The director of special education testified that no documentation was presented at the January 18, 2005, meeting to show that student's absences were all due to her diabetes. The fact that student did not appear to have health issues that were preventing her from going to the community college had an impact on the team's decision. As a matter of fact, student was taking regular classes and being successful without any accommodations. Student was handling a job without special

accommodations. "Student's disability was not impacting her ability to achieve in classes, make friends, hold a job, and participate in outside activities. According the director o special education, parents seemed more upset that student was not made ED than that she was not made OHI. The IEP team observed that contrary to mother's testimony, student did get along with her peers and teachers. Parents shared some of student's emotional problems, but these problems did not appear to be over an extended period of time and to a marked degree. There is no doubt that student over the years persistently had problems going to school. Student just quit going to EHS. Parents gave no reasons as to why she stopped coming to school and there was no documentation showing that she was having problems either emotionally or with her diabetes. Both OHI and ED require a demonstrated showing that the condition is such that it adversely impacts on the student's ability to make educational progress. The consensus of all the participants at the meeting, except for parents, was that student was achieving and was not in need of specially designed instruction to continue to achieve.

Parents argue that the eligibility determination was not timely made. Father signed consent for evaluation on October 29, 2005. Pursuant to 23 Ill. Admin. Code §226.110 (d)(1), the evaluation and IEP meeting shall be completed with 60 school days after the date of referral. The IEP meeting held on January 18, 2005, to determine student's eligibility for special education and related services was held well within the 60 school days after the referral. District promptly

conducted the evaluation requested by parents. The evidence fails to support parents' claim of a delay in evaluating student.

Parents argue that student should be found eligible under emotional disturbance for failure of the school district to follow student's 504 plan. The staff at EHS testified that they were aware of student's 504 plan and made every effort to follow it. No evidence has been presented by the parents to even suggest that the staff did not respect student's privacy regarding her diabetes care. In addition, all student's teachers tried to accommodate student. Many of the teachers were willing to meet student after school, at night, and even on week-ends to assist her in completing her work due to her frequent absences. Mother testified to those instances when a substitute or physical education teacher was unaware of student's 504 plan. Those instances were infrequent. None of the medical records even suggest that any of student's emotional difficulties during June, 2003, were caused by the district's failure to follow student's 504 plan or, if such a failure occasionally occurred, that it caused her to be disabled in an educational context or in need of special education or related services.

Parents argue that Student was denied FAPE by the District's failure to give prior written notice of the evaluations that the district was going to conduct with respect to student's Case Study Evaluation and of the determinations that student was ineligible for special education and related services. In addition, parents argue that district provided no written notice or follow-up from the

district when notified that student would be attending the local community college and that student was removed from the school rolls without prior written notice.

The federal regulations state in pertinent part:

§300.503 Prior notice by the public agency; content of notice.

(a) *Notice.* (1) Written notice that meets the requirements of paragraph b) of this section must be given to the **parents of a child with a disability.** (Emphasis added) 34 C.F.R.§503(a)(1)

The Court in *Krista P. v. Manhattan School District,* 255 F. Supp. 2d 873 (N.D. Ill 2003 found it to be an unsettled question "whether "prior written notice" is required in those circumstances where a student has not been found eligible for special education, but upheld the hearing officer's interpretation of the regulations supported by *Farrell v. Carol Stream School District No 25,* 1996 WL 364743 (N.D.Ill.1996) citing *Hiller v. Board of Education,* 743 F. Supp. 958, 969 (N.D.N.Y. 1990) and *Letter of Inquiry,* 19 IDELR 498(OSEP 1992) that prior notice was not required under those circumstances. As in *Krista P.,* even if parents in this case are correct when they argue that they are entitled to "prior written notice", the record supports a finding that the district provided it. The district provided parents with notice of their rights in accordance with the applicable federal regulation, 34 C.F.R. § 300.503, and virtually an identical state regulation, 23 Ill. Admin. Code § 226.520. On October 29, 2004, father was present

at the meeting and does not deny receiving the team meeting summary and recommendations for the domains in which student would be tested. (SDD A82-83 and PD 83). After the January 18, 2005, parents do not deny receiving a copy of the written report that contained documentation of evaluation results, the eligibility determination, review of the IEP conference summary and disposition, eligibility criteria for OHI and ED, and evaluations. (PD 84- 88) The district conformed with the prior written notice requirement of the IDEA at 20 U.S.C. 1415(b)(1)(c), 34 C.F.R. §300.503(a)(1), and 23 Ill. Admin. Code §226.520 when it provided parents with a copy of the collaborative team's report on October 29, 2004, and the IEP teams report and notice of the team's determination on January 18, 2005. The district met the requirements of 34 C.F. R §300.503(b)(1)-(7) and 23 Admin. Code §226.520(b)(1)-(8) by providing the specific information to parents in the notices and reports. District was not required to provide any follow up when student was unilaterally placed in the local community college by parents. Student was not eligible for special education and related services and the district had no duty to provide services to student or follow up on her private placement. In addition, parents received letters and telephone calls (PE 67) from the district explaining that student would be dropped from enrollment if she did not attend school. Parents cannot now claim that when student was dropped from enrollment at EHS that this was a surprise to them.

In addition, parents argue that they were not able to get any specific procedures with respect to

pursuing a referral. On September 16, 2004, the assistant superintendent sent father a parents' rights booklet along with a letter. Father never told her he was seeking to refer his daughter for a case study evaluation. She sent it based on the conversation she had with him on September 3, 2004, in which she explained how out of district placements might be paid for by the district if a student had an IEP. Father seems to indicate that the district was withholding vital information from him so that he was unable to request a referral for a case study evaluation earlier. There is no evidence to support father's claim. As a matter of fact, the evidence shows that the district was trying to help parents and student in every way possible and that the staff could not have been more accommodating.

Although there is evidence in the record that student is being treated for diabetes and has at times been treated for emotional problems, there is no proof that either of these conditions affected student's educational performance. In order to be classified as a child with a disability, a student must not only have a specific physical, mental or emotional condition, but such condition must adversely impact upon the student's educational performance to the extent that he or she requires special services and programs. In summary, student's health condition does not affect student's educational needs so as to require special education and related services.

Order:

1. The school district appropriately

found student to be ineligible for special education and related services.

2. The district did not violate the parents' procedural rights under the *IDEA* and Illinois law as it provided adequate prior written notice under 34 CFR 300.503 and 23 Ill. Adm. Code §226.160(d).

3. Parents are not entitled to reimbursement for student's unilateral placement at the community college.

Right to Request Clarification:

Either party may request clarification of this decision by submitting a written request for such clarification to me, Gail Tuler Friedman, within five (5) days of receipt of this decision. The request for clarification shall specify the portions of the decision for which clarification is sought and a copy of the request shall be mailed to other parties and the Illinois State Board of Education. The right to request such a clarification does not permit a party to request reconsideration of the decision itself and I, Gail Tuler Friedman, am not authorized to entertain a request for reconsideration.

Finality of Decision:

This decision shall be binding upon the parties unless a civil action is commenced.

Right to File Civil Action:

Any party to this hearing aggrieved by this final

decision as the right to commence a civil action with respect to the issues presented in the hearing. Pursuant to 105 ILCS 5/14-8.02(i), that civil action shall be brought in any court of competent jurisdiction within 120 days after a copy of this decision was mailed to the party.

This Decision and Order rendered this 12th day of September, 2005.

s/Gail Tuler Friedman
Hearing Officer

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
JAN 27 2010
OFFICE OF THE CLERK

No. 09-626

IN THE

Supreme Court of the United States

THOMAS LOCH, *et al.*,

Petitioners,

v.

EDWARDSVILLE COMMUNITY SCHOOLS DISTRICT NO. 7,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

LAURA M. SINARS
Counsel of Record
MARYAM T. BROTINE
ROBBINS, SCHWARTZ, NICHOLAS, LIFTON & TAYLOR, LTD.
55 W. Monroe Street
Suite 800
Chicago, Illinois 60603
(312) 332-7760

Attorneys for Respondent

227735

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether the judicial standard of review for cases arising under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, established by this Court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) is valid.

Whether the educational benefit a child receives, as articulated in *Rowley*, may be considered during the analysis of a child's eligibility for special education and related services under the IDEA.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES OR OTHER PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	11
REASONS FOR DENYING THE PETITION	14
I. THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE NO SUBSTANTIAL ISSUE OF FEDERAL LAW EXISTS.	15
A. This Court Established a Clear Standard of Review for Cases Arising Under the IDEA in *Rowley*.	16
B. The Application of *Rowley* at the District Court Level	17

Contents

Page

C. The Application of *Rowley* at the Appellate Court Level 19

D. Appellate Court Review of Summary Judgment Decisions in the District Court 22

E. The Appellate Courts Uniformly Apply *Rowley* 23

II. ELIGIBILITY DETERMINATIONS UNDER THE IDEA AND THEIR JUDICIAL REVIEW 24

A. Determining Whether a Child is Eligible for Special Education and Related Services Under the IDEA .. 24

1. Finding that a Child Needs Special Education and Related Services 25

B. Judicial Review of Eligibility Determinations 27

III. THE SEVENTH CIRCUIT PROPERLY DECIDED PETITIONERS' CASE. 27

A. The Seventh Circuit Applied the Proper Standard of Review to Petitioners' Case. 27

Contents

Page

B. The Seventh Circuit Properly Upheld Decisions Below Finding Kayla Ineligible for Special Education and Related Services Pursuant to the IDEA. 30

CONCLUSION 32

TABLE OF CITED AUTHORITIES

Page

Cases:

A.B. ex rel. D.B. v. Lawson,
354 F.3d 315 (4th Cir. 2004) 22

A.C. ex rel. M.C. v. Bd. of Educ. of The Chappaqua Central Sch. Dist.,
553 F.3d 165 (2nd Cir. 2009) 22-23

Alex R., ex rel. Beth R. v. Forrestville Valley Comm. Unit Sch. Dist. No. 221,
375 F.3d 603 (7th Cir. 2004) 21

Alvin Indep. Sch. Dist. v. A.D.,
503 F.3d 378 (5th Cir. 2007) 17, 18, 19, 26

Ashland Sch. Dist. v. Parents of Student E.H.,
__ F.3d __, 2009 WL 4546620 (9th Cir. 2009) 17

Ashland Sch. Dist. v. Parents of Student R.J.,
__ F.3d __, 2009 WL 4546736 (9th Cir. 2009) .. 17-18, 19

Babicz v. Sch. Bd. of Broward County,
135 F.3d 1420 (11th Cir. 1998) 25

Beth B. v. Van Clay,
282 F.3d 493 (7th Cir. 2002) 20

Bd. of Educ. of Fayette County, Ky. V. L.M.,
478 F.3d 307 (6th Cir. 2007) 17, 18, 20, 21

Cited Authorities

Page

Bd. of Educ. of Tp. High Sch. Dist. No. 211 v. Ross, 486 F.3d 267 (7th Cir. 2007) .. 17, 18, 19, 20

Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982) ..... *passim*

Burilovich v. Bd. of Educ. of Lincoln Consol. Schools, 208 F.3d 560 (6th Cir. 2000) 19

C.G. ex rel. A.S. v. Five Town Comm. Sch. Dist., 513 F.3d 279 (1st Cir. 2008) 20, 21, 23

CJN v. Minneapolis Public Schs., 323 F.3d 630 (8th Cir. 2003) 17, 18, 19

Deal v. Hamilton County Bd. of Educ., 392 F.3d 840 (6th Cir. 2004) 19

Doe v. Belleville Public Sch. Dist. No. 118, 672 F.Supp. 342 (S.D. Ill. 1987) 25

Doyle v. Arlington County Sch. Bd., 953 F.2d 100 (4th Cir. 1991) 17

Draper v. Atlanta Indep. Sch. System, 518 F.3d 1275 (11th Cir. 2008) 20

Cited Authorities

Page

Ellenberg v. New Mexico Military Inst.,
478 F.3d 1262 (10th Cir. 2007) 20, 22

Erickson v. Albuquerque Public Schs.,
199 F.3d 1116 (10th Cir. 1999) 22

Gagliardo v. Arlington Cent. Sch. Dist.,
489 F.3d 105 (2nd Cir. 2007) 17, 18, 19

Heather S. v. State of Wisconsin,
125 F. 3d 1045 (7th Cir. 1997) 19, 22, 28, 29

Hood v. Encinitas Union Sch. Dist.,
486 F.3d 1099 (9th Cir. 2007) 17, 25

Hunger v. Leininger,
15 F. 3d 669 (7th Cir. 1994) 22

J.D. v. Pawlet Sch. Dist.,
224 F.3d 60 (2nd Cir. 2000) 25

J.L. v. Mercer Island Sch. Dist.,
575 F.3d 1025 (9th Cir. 2009) 19, 20, 21

J.P. ex rel. Peterson v. County Sch. Bd. of Hanover County, Va.,
516 F.3d 254 (4th Cir. 2008) 18, 20

JG v. Douglas County Sch. Dist.,
552 F.3d 786 (9th Cir. 2008) 29

Cited Authorities

Page

Katherine S. v. Umbach,
2002 WL 226697 (M.D. Ala. 2002) 26

Kerkam v. McKenzie,
862 F.2d 884 (D.C. Cir. 1988) 29

L.B. ex rel. K.B. v. Nebo Sch. Dist.,
379 F.3d 966 (10th Cir. 2004) 17, 18, 19, 22

L.E. v. Ramsey Bd. of Educ.,
435 F.3d 384 (3rd. Cir. 2006) 17, 18, 20

L.M. v. Capistrano Unified Sch. Dist.,
556 F.3d 900 (9th Cir. 2009) 20-21

Lenn v. Portland Sch. Comm.,
998 F.2d 1083 (1st Cir. 1993) 18

Letter to Hartman,
213 EHLR 252 (1989) 26

Letter to Pawlisch,
24 IDELR 958 (1995) 25

Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.,
397 F.3d at 83 (2nd Cir. 2005) 23

M.M. ex rel. C.M. v. Sch. Bd.
of Miami-Dade County, Fla.,
437 F.3d 1085 (11th Cir. 2006) 18

Cited Authorities

Page

M.S. ex rel. Simchick v. Fairfax County Sch. Bd.,
553 F.3d 315 (4th Cir. 2009) 19, 21

Mary T. v. Sch. Dist. of Philadelphia,
575 F.3d 235 (3rd Cir. 2009) 18, 20

McLaughlin v. Holt Public Schs. Bd. of Educ.,
320 F.3d 663 (6th Cir. 2003) 21

Missouri Dept. of Elementary and Secondary Educ. v. Springfield R-12 Sch. Dist.,
358 F.3d 992 (8th Cir. 2004) 20, 21

MM ex rel. DM v. Sch. Dist. of Greenville County,
303 F.3d 523 (4th Cir. 2002) 18, 19, 20

Oberti by Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.,
995 F.2d 1204 (3rd Cir. 1993) 21

P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Ed.,
546 F.3d 111 (2nd Cir. 2008) 20, 22, 27

Reid ex rel. Reid v. District of Columbia,
401 F.3d 516 (D.C. Cir. 2005) 22

Renner v. Bd. of Educ. of Public Schs. of City of Ann Arbor,
185 F.3d 635 (6th Cir. 1999) 22

Cited Authorities

Page

Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286 (5th Cir. 2009) 20

Rodiriecus v. Waukegan Sch. Dist. No. 60, 90 F.3d 249 (7th Cir. 1996) 26

S.H. v. State-Operated Sch. Dist. of City of Newark, 336 F.3d 260 (3rd Cir. 2003) 19

Seattle Sch. Dist., No. 1 v. B.S., 82 F.3d 1493 (9th Cir. 1996) 20

Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773 (1st Cir. 1984) 17

Union Sch. Dist. v. Smith, 15 F.3d 1519 (9th Cir. 1994) 21

Walker County Sch. Dist. v. Bennett ex rel. Bennett, 203 F.3d 1293 (11th Cir. 2000) 18

Cited Authorities

Page

Statutes:

20 U.S.C. § 1400 *et seq.* ..... i, 14, 16

20 U.S.C. § 1401(3)(A) 1, 24, 25

20 U.S.C. §1401(3)(A)(ii) 25

20 U.S.C. § 1412(a) 24

20 U.S.C. § 1414(a) 24

20 U.S.C. §1414(b)(4) 24

20 U.S.C. § 1414(c)(1)(B)(ii) 26

20 U.S.C. § 1415(b) 2

20 U.S.C. § 1415(e)(2) 16, 32

20 U.S.C. § 1415(l) 2

20 U.S.C. § 1415(m) 3

28 U.S.C. § 1254(1) 1

29 U.S.C. § 794 25

Page

Other:

34 C.F.R. § 104 25

34 C.F.R. § 300.8 ..... 3, 24

34 C.F.R. § 300.8(a)(1) 25

34 C.F.R. § 300.8(a)(2)(i) 26

34 C.F.R. § 300.8(c)(9) 30

34 C.F.R. § 300.122 24

34 C.F.R. §§ 300.304 through 300.311 26

34 C.F.R. § 300.503 6

34 C.F.R. § 300.532(a) 9

34 C.F.R. § 300.532(b) 10

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") is reported at 327 Fed.Appx. 647 and reprinted in the Appendix to the Petition ("Pet. App.") at A2-A9. The opinion of the United States District Court for the Southern District of Illinois ("Southern District") is comprised of two rulings: the first reported at 2007 WL 1468675, Pet. App. A74-A88, and the second reported at 573 F.Supp.2d 1072, Pet. App. A20-A50. The hearing officer's Decision and Order is found at Pet. App. A89-A109. All other opinions below presented by the Petitioners are irrelevant to the questions presented.

JURISDICTION

The Seventh Circuit entered judgment on June 19, 2009. The Petitioners filed a petition for rehearing with suggestion for rehearing en banc on July 6, 2009. The Seventh Circuit denied Petitioners' petition for rehearing with suggestion for rehearing en banc on August 26, 2009. The petition for a writ of certiorari was filed on November 24, 2009. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

20 U.S.C. § 1401(3)(A) Child with a disability. In general.

> The term "child with a disability" means a child — (i) with mental retardation, hearing impairments (including deafness), speech or

language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.

20 U.S.C. § 1415(b) Types of procedures.

The procedures required by this section shall include the following:

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency— (A) proposes to initiate or change; or (B) refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

20 U.S.C. § 1415(l) Rule of construction.

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such

laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

20 U.S.C. § 1415(m) Transfer of parental rights at age of majority.

(1) In general. A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)— (B) all other rights accorded to parents under this subchapter transfer to the child;

34 C.F.R. § 300.8 Child with a disability.

(a) General.

(1) Child with a disability means a child evaluated in accordance with *§§ 300.304* through *300.311* as having mental retardation, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning

disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

(2)

(i) Subject to paragraph (a)(2)(ii) of this section, if it is determined, through an appropriate evaluation under *§§ 300.304* through *300.311*, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part.

(ii) If, consistent with *§ 300.39(a)(2)*, the related service required by the child is considered special education rather than a related service under State standards, the child would be determined to be a child with a disability under paragraph (a)(1) of this section.

(c) Definitions of disability terms. The terms used in this definition of a child with a disability are defined as follows:

(4)

(i) Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) Emotional disturbance includes schizophrenia. The term does not apply to children

> who are socially maladjusted, unless it is determined that they have an emotional disturbance under paragraph (c)(4)(i) of this section.

(9) Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

> (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
>
> (ii) Adversely affects a child's educational performance.

34 C.F.R. § 300.503 Prior notice by the public agency; content of notice.

> (a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency—

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) Content of notice. The notice required under paragraph (a) of this section must include—

(1) A description of the action proposed or refused by the agency;

(2) An explanation of why the agency proposes or refuses to take the action;

(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(4) A statement that the parents of a child with a disability have protection under

the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;

(6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and

(7) A description of other factors that are relevant to the agency's proposal or refusal.

(c) Notice in understandable language.

(1) The notice required under paragraph (a) of this section must be— (i) Written in language understandable to the general public; and (ii) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

> (2) If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure— (i) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication; (ii) That the parent understands the content of the notice; and (iii) That there is written evidence that the requirements in paragraphs (c)(2)(i) and (ii) of this section have been met.

34 C.F.R. § 300.532(a) General.

> The parent of a child with a disability who disagrees with any decision regarding placement under §§ 300.530 and 300.531, or the manifestation determination under § 300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to §§ 300.507 and 300.508(a) and (b).

34 C.F.R. § 300.532(b) Authority of hearing officer.

(1) A hearing officer under § 300.511 hears, and makes a determination regarding an appeal under paragraph (a) of this section.

(2) In making the determination under paragraph (b)(1) of this section, the hearing officer may— (i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of § 300.530 or that the child's behavior was a manifestation of the child's disability; or (ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

(3) The procedures under paragraphs (a) and (b)(1) and (2) of this section may be repeated, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

STATEMENT OF THE CASE

Petitioners Thomas, Glenna and Kayla Loch ("Petitioners") initially filed their complaint against the Board of Education of Edwardsville Community Unit School District #7 ("the District") in the United States District Court for the Southern District of Illinois ("Southern District") on January 10, 2006.

The Petitioners filed an amended ten-count complaint on November 8, 2006, appealing an administrative ruling issued by an administrative hearing officer on September 12, 2005, which found Kayla ineligible for special education and related services under the Individuals with Disabilities Education Act ("IDEA").

The complaint alleged that Kayla was denied special education services, and thus a free appropriate public education ("FAPE"), in violation of her rights under the IDEA, Americans with Disabilities Act ("ADA") and under Section 504 of the Rehabilitation Act of 1973 ("Section 504"). Pet. App. A52.

The complaint further alleged the District violated Mr. and Mrs. Loch's ("Parents") procedural due process rights under the IDEA, violated the Loch's § 1983 rights, retaliated against Parents for filing a Human Rights Authority complaint against the District and thus violated their rights under Title VI of CRA, § 504 of Rehabilitation Act & ADA, CRRA of 1987 / Title IX. Pet. App. A52. Finally, the complaint alleged that Kayla was sexually discriminated against in violation of her rights under Title VI of the CRA, CRRA of 1987

including Title IX of the education amendments, Title V and the ADA. Pet. App. A52.

As a result of Respondent's motion to dismiss, the Southern District determined that: 1) Parents lacked standing to assert claims under § 1983 and dismissed Count VII and Count X of the Amended Complaint on May 18, 2007, Pet. App. A87; and 2) Kayla could not bring a claim of sex discrimination under Title VI of the CRA; and 3) dismissed the Title VI portion of Count III on May 18, 2007. Pet. App. A82.

The Southern District, as a result of Respondent's motion to dismiss, determined Kayla could not bring a claim of sex discrimination under the ADA and dismissed the ADA portion of Count III on May 18, 2007. Pet. App. A83.

The Southern District, as a result of Respondent's motion for summary judgment, determined there was no error in the hearing officer's decision, that the District was willing and able to provide Kayla with a FAPE, that Kayla's diabetes was accommodated through a Section 504 plan, that Parents' procedural due process rights under the IDEA were not violated and dismissed all remaining counts of the complaint. Pet. App. A50. Judgment was entered in Respondent's favor on July 15, 2008. Pet. App. A50.

On July 29, 2008, the Petitioners filed a motion to alter or amend the District Court's judgment and order of July 15, 2008. Pet. App. A10. While this motion was pending, the Petitioners appealed the judgment entered on July 15, 2008 to the United States Court of Appeals

for the Seventh Circuit ("Appellate Court"). Pet. App. 3. The District Court denied Petitioners' motion to alter or amend judgment on November 13, 2008. Pet. App. A10-A19.

The Appellate Court undertook a *de novo* review of the District Court's decision to dismiss certain of the Petitioners' claims for lack of standing and failure to exhaust administrative remedies. Pet. App. A6. The Appellate Court found that the Petitioners' claims under the ADA, Section 504 and Title IX for a revised education plan and tuition reimbursement should have been addressed at the administrative level and, since they were not, the Petitioners were barred from asserting those claims on appeal. Pet. App. A7.

The Appellate Court next reviewed the District Court's decision granting Respondent's Motion for Summary Judgment. Pet. App. A7. The Appellate Court upheld the District Court's findings that the Petitioners did not meet their burden of showing Kayla required special education, the District followed proper procedure in notifying the Petitioners that Kayla would be dropped from enrollment if she did not attend school, and the Petitioners were not entitled to reimbursement for Kayla's community college expenses. Pet. App. A8-A9. After reviewing the fully briefed appeal, the Appellate Court entered judgment in the Respondent's favor on June 19, 2009. Pet. App. A9.

The Petitioners filed a petition for rehearing with suggestion for rehearing en banc on July 6, 2009. Pet. App. A1. The Appellate Court denied Petitioners' petition for rehearing with suggestion for rehearing en banc on August 26, 2009. Pet. App. A1.

The Petitioners filed a petition for a writ of certiorari with this Court on November 24, 2009.

REASONS FOR DENYING THE PETITION

Petitioners misrepresent the first question presented by this case as whether the proper standard of judicial review for cases arising under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, is one of *de novo* or clear error review and suggest that the circuits are divided on this issue. Rather, the central question is whether the standard of review established by this Court in *Bd. of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) is valid. The answer to that question is "yes," and has been settled for well over 27 years. Further, there is no circuit split on the legal questions presented by the instant case.

Petitioners also misrepresent the second question presented by this case as whether the *Rowley* "'due weight' deference and 'educational benefit' analysis [is] applicable, in the judicial review regarding whether a child was improperly denied special education and related services." Pet. App. ii. The proper question before this Court is whether the educational benefit to a child, as articulated in *Rowley*, may be considered during the analysis of a child's eligibility for special education and related services under the IDEA. *Rowley*'s educational benefit analysis is helpful when determining whether a child with a disability that adversely affects educational performance "needs" special education and related services under the IDEA, and thus should be considered in eligibility determinations.

I. THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE NO SUBSTANTIAL ISSUE OF FEDERAL LAW EXISTS.

Judicial review of cases arising under the IDEA is complex and encompasses three distinct types of review: 1) questions of law; 2) mixed questions of law and fact; and 3) questions of fact. As set forth below, questions of law are reviewed *de novo*, questions of mixed law and fact are reviewed *de novo*, and questions of fact are reviewed for clear error. Additionally, reviewing courts apply a "deference continuum" to decisions made during underlying administrative hearings.

The unique circumstances of each case dictate whether some or all of the preceding questions are examined by the reviewing court, as well as the depth of the court's review. Accordingly, courts may articulate the standard of review differently depending upon what types of questions are central to the case at hand. Despite varied articulation, it is clear that this multi-tiered review is one comprehensive standard of judicial review applied to cases arising under the IDEA. Moreover, this comprehensive standard of review is uniformly applied by the circuit courts of appeals.

In asserting that multiple standards of review exist for IDEA cases, Petitioners have confused the distinct analyses for questions of law, questions of fact, and questions of mixed law and fact. These are not separate standards of review; rather, together they comprise the multi-tiered, comprehensive standard of review for cases arising under the IDEA.

A. This Court Established a Clear Standard of Review for Cases Arising Under the IDEA in *Rowley*.

This Court established the standard of judicial review for cases arising under the Education for All Handicapped Children Act ("EAHCA"), the predecessor to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, in *Rowley*. The EAHCA provided that during judicial review, courts "'shall receive the record of the [state] administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.'" *Id.* at 205, citing 20 U.S.C. § 1415(e)(2). The issue in *Rowley* was to determine the exact meaning of this statutory provision and what judicial standard to apply. The *Rowley* petitioners asserted that courts had limited review powers, while the *Rowley* respondents argued for a complete *de novo* standard of review. *Id.* The *Rowley* Court reasoned that the requirement that courts receive the records of the administrative proceeding implied that courts should give "due weight" to the administrative proceedings. *Id.* at 206. The *Rowley* Court further reasoned that the requirement that decisions be based upon the "preponderance of the evidence" was not "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Id.*

The *Rowley* standard of review continues to be sound and, contrary to Petitioners' assertions, applies

to all cases arising under the IDEA. Whether the issue at judicial review is the appropriateness of a student's individualized educational program ("IEP"), *Town of Burlington v. Dep't of Educ. for Com. of Mass.*, 736 F.2d 773 (1st Cir. 1984), a hearing officer's award of reimbursement, *Ashland Sch. Dist. v. Parents of Student E.H.*, __ F.3d __, 2009 WL 4546620 (9th Cir. 2009), or a student's eligibility for special education and related services, *Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099 (9th Cir. 2007), the *Rowley* standard of review still applies.

B. The Application of *Rowley* at the District Court Level

At the district court level, claims arising under the IDEA are subject to a modified *de novo* standard of review. *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 398 (3rd. Cir. 2006); *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 973 (10th Cir. 2004). *Rowley* established this requires district courts to independently review evidence contained in the administrative record to determine whether the IDEA's requirements have been satisfied. *Gagliardo v. Arlington Central Sch. Dist.*, 489 F.3d 105, 112 (2nd Cir. 2007); *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 103 (4th Cir. 1991); *Alvin Indep. Sch. Dist. v. A.D. ex rel. Patricia F.*, 503 F.3d 378, 381 (5th Cir. 2007); *Bd. of Educ. of Fayette County, Ky. V. L.M.*, 478 F.3d 307, 312 (6th Cir. 2007); *Bd. of Educ. of Tp. High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267, 270 (7th Cir. 2007); *CJN v. Minneapolis Public Schs.*, 323 F.3d 630, 636 (8th Cir. 2003). *See also Ashland Sch. Dist.*

v. Parents of Student R.J., __ F.3d __, 2009 WL 4546736, 4 (9th Cir. 2009) (wherein the appellate court titles a district court's review "*de novo*" but also provides for giving due weight to hearing officers' decisions, effecting a modified *de novo* standard of review).

The district court's review becomes "modified" because it must also give "due weight" to underlying administrative decisions. "In the course of this independent review, the administrative proceedings must be accorded 'due weight.'" *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083, at 1087 (1st Cir. 1993) (quoting *Rowley* at 206). *Gagliardo at* 113; *Ramsey* at 389; *MM ex rel. DM v. Sch. Dist. of Greenville County*, 303 F.3d 523, 531 (4th Cir. 2002); *Alvin at* 381; *Fayette County at* 312; *Ross at* 270; *Minneapolis at* 636; *Parents of Student R.J.* at 4; *Nebo at* 974; and *Walker County Sch. Dist. v. Bennett ex rel. Bennett*, 203 F.3d 1293, 1297 (11th Cir. 2000).

Rowley's "due weight" requirement directs district courts to consider findings of fact to be *prima facie* correct and, if the district court fails to adhere to those findings, it must explain why. *Mary T. v. Sch. Dist. of Philadelphia*, 575 F.3d 235, 241 (3rd Cir. 2009); *J.P. ex rel. Peterson v. County Sch. Bd. of Hanover County, Va.*, 516 F.3d 254, 259 (4th Cir. 2008); *Nebo at* 974; and *M.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade County, Fla.*, 437 F.3d 1085 (11th Cir. 2006). An explanation is required when a district court deviates from an administrative hearing's findings of fact because, as *Rowley* states, courts must be careful not substitute their own notions

of sound educational policy for those of local school authorities. *Gagliardo at* 113; *S.H. v. State-Operated Sch. Dist. of City of Newark*, 336 F.3d 260, 270 (3rd Cir. 2003); *MM ex rel. DM at* 531; *Deal v. Hamilton County Bd. of Educ.*, 392 F.3d 840, 849 (6th Cir. 2004); *Ross at* 270; *Minneapolis at* 636; *Parents of Student R.J.* at 4.

Finally, district courts' decisions must be based on a preponderance of the evidence. *Gagliardo at* 112; *S.H. at* 270; *MM ex rel. DM at* 531; *Alvin at* 381; *Deal at* 849; *Ross at* 270; *Parents of Student R.J.* at 4; and *Nebo at* 973.

C. The Application of *Rowley* at the Appellate Court Level

Claims arising under the IDEA at the appellate court level are also subject to a modified *de novo* standard of review. *S.H. at* 270; *M.S. ex rel. Simchick v. Fairfax County Sch. Bd.*, 553 F.3d 315, 323 (4th Cir. 2009); *Burilovich v. Bd. of Educ. of Lincoln Consol. Schs.*, 208 F.3d 560, 565 (6th Cir. 2000). *See also J.L. v. Mercer Island Sch. Dist.*, 575 F.3d 1025, 1035 (9th Cir. 2009) (stating complete *de novo* review is inappropriate); *Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1053 (7th Cir. 1997) ("While we thus review the ultimate determination *de novo*, in the absence of any mistake of law, we may only reverse the district court if its findings were clearly erroneous.").

In effectuating the modified *de novo* standard of review, appellate courts will analyze questions of law under a traditional *de novo* or plenary standard of review. *C.G. ex rel. A.S. v. Five Town Comm. Sch. Dist.*, 513 F.3d 279, 284 (1st Cir. 2008); *Mary T. at* 242 ; *Fayette County at* 313; *Ross at* 270; *Missouri Dept. of Elementary and Secondary Educ. v. Springfield R-12 Sch. Dist.*, 358 F.3d 992, 998 (8th Cir. 2004); *Seattle Sch. Dist., No. 1 v. B.S.*, 82 F.3d 1493, 1499 (9th Cir. 1996); and *Ellenberg v. New Mexico Military Inst.*, 478 F.3d 1262, 1274 (10th Cir. 2007).

Appellate courts will also analyze mixed questions of law and fact under a traditional *de novo* or plenary standard of review. *Five Town* at 284; *P. ex rel. Mr. and Mrs. P. v. Newington Bd. of Ed.*, 546 F.3d 111, 118 (2nd Cir. 2008); *Ramsey at* 389; *Peterson County at* 259; *Richardson Indep. Sch. Dist. v. Michael Z.*, 580 F.3d 286, 291 (5th Cir. 2009); *Fayette County at* 313; *Beth B. v. Van Clay*, 282 F.3d 493, 496 (7th Cir. 2002); *Missouri at* 998; *Mercer Island at* 1035; *and Draper v. Atlanta Indep. Sch. System*, 518 F.3d 1275, 1284 (11th Cir. 2008).

The "modified" element of the *de novo* standard of review appears when appellate courts review a lower court's factual findings. Absent a mistake of law, factual findings are reviewed for clear error. *Five Town at* 284; *Mary T. at* 242; *MM ex rel. DM at* 531; *Richardson at* 291; *Fayette County at* 313; *Ross at* 270; *Missouri* at 998; *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900, 908 (9th Cir. 2009); *and Draper* at 1284.

Like district courts, appellate courts must give "due weight" or deference to the underlying administrative proceedings. *M.S. ex rel. Simchick at* 332; *Fayette County at* 313; *Ross at* 270; *Missouri* at 998; *Mercer Island at* 1035. The amount of weight or deference given to administrative findings is left to the discretion of the reviewing court, and should be determined on a case by case basis. "Less weight is due to an agency's determinations on matters for which educational expertise is not relevant because a federal court is just as well suited to evaluate the situation. More weight is due to an agency's determinations on matters for which educational expertise is relevant." *McLaughlin v. Holt Public Schs. Bd. of Educ.*, 320 F.3d 663, 669 (6th Cir. 2003). *See also Alex R., ex rel. Beth R. v. Forrestville Valley Comm. Unit Sch. Dist. No. 221*, 375 F.3d 603, 612 (7th Cir. 2004) ("'Due weight' varies from case to case."); *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994). Appellate courts may also consider whether a district court abused its discretion by failing to give due weight to administrative findings. *See Oberti by Oberti v. Bd. of Educ. of Borough of Clementon Sch. Dist.*, 995 F.2d 1204, 1220 (3rd Cir. 1993). Since the amount of weight or deference given to administrative findings is case-specific, some courts have characterized the appellate standard of review as a "deference continuum." *Five Town at* 284.

D. Appellate Court Review of Summary Judgment Decisions in the District Court

Though the appeal of an order granting summary judgment is typically reviewed *de novo*, a distinct standard applies to the review of claims made under the IDEA. *Renner v. Bd. of Educ. of Public Schs. of City of Ann Arbor*, 185 F.3d 635, 641 (6th Cir. 1999); *Heather S. at* 1052. "'. . . Because the IDEA requires a district court to grant a judgment on the record based on its own ascertainment of the preponderance of the evidence, many IDEA claims do not fit into the typical summary judgment standard of no genuine issues of material fact.'" *Ellenberg at* 1274 (quoting *Nebo at* 974). In an IDEA case, "while our review is *de novo*, it is tinged with a significant degree of deference to the state educational agency, as we are essentially acting in an administrative-law-style capacity." *Newington at* 118. *See also A.B. ex rel. D.B. v. Lawson*, 354 F.3d 315, 325-325 (4th Cir. 2004); *Erickson v. Albuquerque Public Schs.*, 199 F.3d 1116, 1120 (10th Cir. 1999).

When the district court does not hear new evidence, "'[t]he motion for summary judgment is simply the procedural vehicle for asking the judge to decide the case on the basis of the administrative record.'" *Heather S.* at 1052 (quoting *Hunger v. Leininger*, 15 F. 3d at 669 (7th Cir. 1994)). See also *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516, 522 (D.C. Cir. 2005). Simply put, it is a "'pragmatic procedural mechanism' for reviewing administrative decisions." *A.C. ex rel. M.C. v. Bd. of Educ. of The Chappaqua Central Sch. Dist.*, 553 F.3d

165, 171 (2nd Cir. 2009) (quoting *Lillbask ex rel. Mauclaire v. Conn. Dep't of Educ.*, 397 F.3d at 83 (2nd Cir. 2005)).

E. The Appellate Courts Uniformly Apply *Rowley*

As discussed *supra*, the appellate courts uniformly apply the multi-tiered standard of review set forth in *Rowley* to cases arising under the IDEA. Petitioners incorrectly assert that some circuits apply a *de novo* standard, others apply a modified *de novo* standard, and still others apply a clear error standard. The cases cited by Petitioners do not support their contentions. Moreover, Petitioners have selectively edited their case citations to create the illusion of a conflict among the circuits where there is none.

Whether an appellate court titles its review *de novo* or modified *de novo* is of little importance. The fact remains that the appellate courts consistently review questions of law and mixed questions of law and fact *de novo*, review district courts' factual findings for clear error, and give due weight to underlying administrative hearings. The amount of deference the appellate courts grant underlying administrative hearing decisions varies depending upon the facts of the case at hand, which is why the courts are afforded discretion and employ a deference continuum. *See Five Town* at 264. Because the appellate courts uniformly apply the standard of review, no substantial issue of federal law exists and this Court should deny Petitioners' Petition.

II. ELIGIBILITY DETERMINATIONS UNDER THE IDEA AND THEIR JUDICIAL REVIEW

A. Determining Whether a Child is Eligible for Special Education and Related Services Under the IDEA

Section 1401(3)(A) of the IDEA provides that a "child with a disability" is

> "a child (i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services."

See also 34 C.F.R. § 300.8(a)(1). In order to find a child eligible for special education and related services under the IDEA, each child suspected of having a disability must be evaluated. 20 U.S.C. § 1412(a), 1414(a); 34 C.F.R. § 300.122. Following evaluation, a team of parents and educational professionals review evaluation results and make an eligibility determination. 20 U.S.C. §1414(b)(4).

To find a child eligible for special education and related services under the IDEA, the child must: 1) have an enumerated disability; 2) the disability must adversely affect the child's educational performance ("by reason thereof"); and 3) the child must need special education.

See 20 U.S.C. § 1401(3)(A). Many courts utilize this as a "two-prong" test because they classify the "adversely affects" requirement as a subpart of finding a qualifying disability. *Hood* at 1105; *Babicz v. Sch. Bd. of Broward County*, 135 F.3d 1420, 1422 (11th Cir. 1998). Clearly, however, all three prongs must be satisfied to find a child eligible for special education and related services under the IDEA. *Doe v. Belleville Public Sch. Dist. No. 118*, 672 F.Supp. 342, 344 (S.D. Ill. 1987). The Loch decision turns upon the third part of the test: whether Kayla "needs" special education and related services.

1. Finding that a Child Needs Special Education and Related Services

Even if a child has a qualifying disability which adversely affects educational performance, they will not be eligible for special education and related services under the IDEA unless such services are needed. 20 U.S.C. § 1401(3)(A)(ii); 34 C.F.R. § 300.8(a)(1). The IDEA's express provision that a child must "need" special education is a critical distinction between eligibility under Section 504 of the Rehabilitation Act of 1973 and eligibility under the IDEA. 29 U.S.C. § 794; 34 C.F.R. § 104; *J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 70 (2nd Cir. 2000). The IDEA contains no specific guidelines for determining whether an impaired student needs special education, and instead leaves the meaning of "needs" to the states. *J.D. at* 66; *Letter to Pawlisch*, 24 IDELR 958, 959 (1995).

In order to determine what a child needs, the child's present levels of educational performance are

considered. 20 U.S.C. § 1414(c)(1)(B)(ii). It is at this juncture that courts may refer to the "educational benefit" analysis conducted in *Rowley*. Though *Rowley* addressed the provision of a free appropriate public education to a child already eligible for and receiving services under the IDEA, *Rowley*'s analysis is helpful in that it expressly identified a class of eligible children that was passing from grade to grade yet not being appropriately served. *Rowley* at 203. This Court held that "[t]he grading and advancement system thus constitutes an important factor in determining educational benefit." *Id.*

The services or accommodations a child receives under a 504 plan must be factored into determining his or her present levels of educational performance. This is so because "a student who has an impairment, but who only needs a related service and not special education, is not a 'student with a disability' within the meaning of the law." *Katherine S. v. Umbach*, 2002 WL 226697, 10 (M.D. Ala. 2002). Further, the IDEA implementing regulations provide that "if it is determined, through an appropriate evaluation under §§ 300.304 through 300.311, that a child has one of the disabilities identified in paragraph (a)(1) of this section, but only needs a related service and not special education, the child is not a child with a disability under this part." 34 C.F.R. 300.8(a)(2)(i). If a child is performing above average, then no need for special education exists. *Rodiriecus v. Waukegan Sch. Dist. No. 60*, 90 F.3d 249, 254 (7th Cir. 1996); *Alvin Indep. Sch. Dist. v. A.D.*, 503 F.3d 378, 384 (5th Cir. 2007); *Letter to Hartman*, 213 EHLR 252, 254 (1989).

B. Judicial Review of Eligibility Determinations

As discussed in Part I(B), *supra*, eligibility determinations made pursuant to the IDEA are reviewed under the same modified *de novo* standard of judicial review that applies to all determinations made under the IDEA. Namely, questions of law and mixed questions of law and fact are analyzed under a traditional *de novo* or plenary standard of review, factual findings are reviewed for clear error (absent a mistake of law), underlying administrative proceedings are given deference, and grants of summary judgment are reviewed *de novo* while "tinged with a significant degree of deference" to administrative proceedings. *Newington at* 118.

III. THE SEVENTH CIRCUIT PROPERLY DECIDED PETITIONERS' CASE.

Over and above the fact that a multi-tiered, comprehensive standard of review is uniformly applied throughout the nation, this case is not the proper vehicle for a grant of certiorari because the Seventh Circuit properly decided Petitioners' case.

A. The Seventh Circuit Applied the Proper Standard of Review to Petitioners' Case.

The Seventh Circuit applied the proper standard of review to Petitioners' case. First, the Seventh Circuit analyzed the Southern District's May 18, 2007 order dismissing certain of the Petitioners' claims. Since analysis of this order required a review of questions of law and questions of fact, the Seventh Circuit reviewed

the order *de novo*. Pet. App. A6. The Seventh Circuit concurred with the Southern District's finding that Parents' claims under the IDEA transferred to Kayla when she reached the age of majority. Pet. App. A6. The Seventh Circuit also agreed that Parents failed to exhaust certain claims at the administrative level and were then barred from presenting them for judicial review. Pet. App. A7.

Next, consistent with *Heather S.*, the Seventh Circuit properly analyzed the Southern District's grant of summary judgment on Kayla's IDEA claims under a standard of review distinct from the typical standard of review employed "in evaluating a district court's grant of summary judgment." Pet. App. A7. Since no new evidence was presented to the Southern District, the Seventh Circuit stated that "'the motion for summary judgment is simply the procedural vehicle for asking the judge to decide the case on the basis of the administrative record.'" Pet. App. A7 (quoting *Heather S.* at 1052). The Court's noted that "even though it is termed a "summary judgment," the district court's decision is based on the preponderance of the evidence and we reverse only if the court's findings were clearly erroneous." *Id.* (citing *Heather S.* at 1052). Though the Seventh Circuit's unpublished opinion did not elaborate further on the standard of review of summary judgment for IDEA cases, they liberally cited to their earlier decision in *Heather S.*, wherein the Seventh Circuit applied the *Rowley* standard:

> "In reviewing the administrative record, the district court is required to give 'due weight' to the results of the administrative

> proceedings and not 'to substitute [its] own notions of sound educational policy for those of the school authorities.' Whose decision it is reviewing . . . We review the district court's judgment as a mixed question of law and fact. While we thus review the ultimate determination de novo, in the absence of any mistake of law, we may only reverse the district court if its findings were clearly erroneous."

Heather S. at 1052-1053, internal citations omitted.

Furthermore, the Seventh Circuit's standard of review is completely consistent with the plain reading of the IDEA. In making assertions to the contrary,[1] Petitioners rely upon labor law cases which are clearly distinguishable from IDEA cases given that administrative decisions made under the IDEA are not evaluated in the same manner as other administrative decisions. "In IDEA cases, unlike other cases reviewing administrative action, we do not employ a highly deferential standard of review." *JG v. Douglas County Sch. Dist.*, 552 F.3d 786, 793 (9th Cir. 2008). *See also Kerkam v. McKenzie*, 862 F.2d 884, 887 (D.C. Cir. 1988) (reasoning that less deference is due to an agency's actions and expertise under the IDEA than is conventionally afforded.). Because Petitioners' argument is inapposite to the law, it should not be considered.

---

[1] P. 32 of Petitioners' Petition

B. The Seventh Circuit Properly Upheld Decisions Below Finding Kayla Ineligible for Special Education and Related Services Pursuant to the IDEA.

In properly applying the IDEA's eligibility test, the Seventh Circuit first considered the factual findings that: 1) Kayla had diabetes; 2) Kayla suffered from anxiety about attending classes at Edwardsville High School; 3) Kayla's grades were satisfactory until she stopped attending class in the spring of 2004; 5) Kayla's doctors reported she was in good health and her diabetes should not interfere with attendance; and 6) Petitioners offered no medical basis for Kayla's better attendance and performance at community college. Pet. App. A7-A8.

IDEA regulations state that diabetes qualifies as a disability as an "other health impairment." 34 C.F.R. § 300.8(c)(9). In addition to diabetes, Kayla was later diagnosed with an adjustment disorder, anxiety, depression, and social anxiety disorder. Pet. App. A3. Although Kayla was identified as having an "other health impairment", she did not need special education and related services as required by the IDEA to meet the standard for eligibility as a student with a disability.

The Seventh Circuit carefully considered whether Kayla was in "need" of special education and related services of the IDEA and found that she was not. While the Court cited Kayla's satisfactory grades until she stopped attending school, the Court also specifically noted the lack of medical evidence that Kayla stopped attending school due to her diabetes or anxiety, the

statement from her physician indicating that her health should not interfere with school attendance and Petitioners' failure to offer any medical basis for Kayla's improved attendance and performance at community college. Pet. App. A8. Contrary to Petitioners' assertions[2], the Seventh Circuit did not hold that a child's record of average or above average grades alone proves they are ineligible for special education. Rather, as illustrated in Part III(A) *supra* and consistent with *Rowley*, the Seventh Circuit considered Kayla's grades as "one important factor in determining educational benefit" and one factor, therefore, in determining the need for special education. *Rowley at* 207.

In light of the fact that Kayla was performing well and her absenteeism was not a result of diabetes or emotional problems, the hearing officer found Kayla ineligible for special education and related services. Pet. App. A5, A38-39. This ruling was upheld by the District Court for the Southern District of Illinois, Pet. App. A5, A41, and, ultimately, by the Seventh Circuit. Pet. App. A8.

---

[2] P. 30 of Petitioners' Petition

CONCLUSION

Implicit in the requirement under §1415(e)(2) of the IDEA that courts review administrative proceedings is the importance of deference to such proceedings. *Rowley*'s multi-tiered standard of review not only allows for such deference, it explicitly cautions courts not to "substitute their own notions of sound educational policy for those of the school authorities which they review." *Rowley* at 3051.

Chief Justice Easterbrook, Justice Williams and Justice Tinder faithfully applied *Rowley* in rendering their decision upholding the Southern District's rulings. The Court applied the well established standard of review and proper educational analysis under the IDEA in upholding the decisions of the lower court.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LAURA M. SINARS
Counsel of Record
MARYAM T. BROTINE
ROBBINS, SCHWARTZ, NICHOLAS,
LIFTON & TAYLOR, LTD.
55 W. Monroe Street
Suite 800
Chicago, Illinois 60603
(312) 332-7760

Attorneys for Respondent

(3)

No. 09-626

Supreme Court, U.S.
FILED
FEB 19 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

Thomas, Glenna and Kayla Loch,

Petitioner,

v.

Edwardsville Community Schools, District No. 7,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Thomas H. Loch
Glenna H. Loch
Kayla N. Loch

Petitioners, Pro Se
5 Goldenrod Lane
Edwardsville, Illinois 62025
(618) 656-1908
(314) 952-3960

TABLE OF CONTENTS

Page

Table of Contents..... ii

Table of Cited Authorities..... iv

Introduction..... 1

1. The Respondent's Restatement Of Questions Presented Do Not Accurately State The Issue..... 2

2. The Court of Appeals Split Is Real, Intractible, And Warrants This Court's Intervention..... 3

3. The *Rowley* "Due Weight" Deference Is Not Applicable In Testing For IDEA Eligibility..... 4

4. Under IDEA, Eligibility Is Determined In Compliance With Federal and State Regulations – The Majority Of Circuits Review As A "Mixed Question Of Law And Fact"..... 6

   A. The *Rowley* "Educational Benefit" Analysis Is Not Applicable In Determining A Child's Eligibility For Special Education..... 7

5. The Clear Error/Abuse of Discretion (i.e., "*Rowley* Standard") Is Inappropriate For Issues Involving Statutory Interpretation – The Circuit Split Exists As A Result..... 9

6. De Novo Review Is Only Appropriate Standard For Cases Involving IDEA Statutory Interpretation..... 11

7. Nothing About This Case Would Result In A Fact-Bound Decision From The Court Or Prohibit It From Deciding The Question Presented..... 12

CONCLUSION..... 13

TABLE OF CITIED AUTHORITIES

CASES: **Page**

United States Supreme Court Cases

Bell v. Wolfish
441 U.S. 520, 544 (1979)..... 4

Board of Educ. of Henrick Hudson Cent. Sch. Dist. v. Rowley
458 U.S. 176 (1982)..... *passim*

Cedar Rapids Comm. Sch. Dist. v. Garret F.
526 U.S. 66 (1999)..... 6

Irving Indep. Sch. Dist. v. Tatro
486 U.S. 883 (1984)..... 6

Miller v. Fenton
474 U.S. 104, 114 (1985)..... 11

Ornelas et al. v. United States
517 U.S. 694-695 (1996)..... 2, 11

Pierce v. Underwood
487 U.S. 552, 558 (1988)..... 2

Pullman-Standard v. Swint
456 U.S. 273, 289 n. 19 (1982)..... 11

Winkelman v. Parma City Sch. Dist.
127 S.Ct. 2000 (2007)..... 9

Young v. Romeo
457 U.S. 307, 323 (1982)..... 4

United States Circuit Court of Appeals Cases

Ammex Inc. v. United States
367 F.3d 530, 533 (CA6 2004)..... 10

Daniel R.R. v. State Bd. of Educ.
874 F.2d 1036, 1044 (CA5 1989)..... 8

J.D. v. Pawlet School District
224 F.3d 60, 65 (CA2 2000)..... 6, 8

Mr. I v. Maine Sch. Administrative Dist. No. 55
480 F.3d 9 (CA1 2007)..... 7

Matter of McLinn
739 F.2d 1395, 1397 (CA9 1984)..... 11

Timothy W. v. Rochester N.H. High School Dist.
875 F.2d 954, 961, 971 (CA1 1989).... 5, 10

Town of Burlington v. Dep't of Educ.
736 F.2d 778-89 (CA1 1984)..... 8

Weixel v. Bd. of Educ.
287 F.3d 138, 150 (CA2 2002)..... 10

Yankston Sch. Dist. v. Schramm
93 F.3d 1369, 1374 (CA8 1996)..... 10

Federal Statutes and Regulations:

Individuals with Disabilities in Education Act

20 U.S.C. § 1400 *et seq.* .....*passim*

20 U.S.C § 1400(3)..... 6

20 U.S.C. § 1401(3)(A)(1)(i)..... 5

20 U.S.C. § 1412(a)(1)(A)..... 8

Code of Federal Regulatons:

34 C.F.R. § 300 *et seq*.....*passim*

34 C.F.R. § 300.304..... 6

34 C.F.R. § 300.8..... 5, 6

34 C.F.R. § 300.8(c)(1)-(c)(13)..... 8

34 C.F.R. § 300.8(c)(4)(i)..... 5

34 C.F.R. § 300.8(c)(9)(i)..... 5

State Statutes and Regulations

23 Ill. Admin Code § 226.75..... 8

OTHER AUTHORITIES

Stern, Robert L. *et al.*, "*Supreme Court Practice 455*" (8th edition 2002)..... 12

Weber, Mark C., "*The IDEA Eligibility Mess*" Buffalo Law Review, Vol. 57:1 83 (2009)..... 12

REPLY BRIEF FOR THE PETITIONERS

The Individual with Disabilities in Education Act ("IDEA")'s promise of a free appropriate public education ("FAPE") provided in accordance with an individual education plan ("IEP") is stripped of its vitality when children intended to benefit from the Act do not receive the law's benefits. While the Respondent seeks to persuade this Court by reframing the Petitioners' questions, the Respondent has not, and cannot, contest the overriding importance of the Petitioners' questions involving IDEA eligibility, a statutory privilege which affects thousands of disabled children and their ability to access educational services — in order to benefit from their public education.

The Respondent is also wrong in asserting the circuit courts are applying "one comprehensive standard of review" in IDEA cases involving a child's eligibility. The court of appeals are split concerning this issue. Four circuits conduct a de novo review, while three others utilize the "clear error" (abuse of discretion) standard. *See* Pet. at 18. Apart from the circuit split over it, the importance of the Petitioners' question, even presented alone, should warrant this Court's review.

Respondent also attempts to characterize this case as an improper vehicle for deciding the questions presented. But none of its assertions, even if factually correct, establishes that there are any inpediments to this Court conclusively deciding the important question of federal law presented, which continues to divide the circuit courts and deny certain disabled children the

Act's express guarantee — of a free appropriate public education for "*all* children with disabilites."

1. The Respondent's Restatement Of Questions Presented Do Not Accurately State The Issue

Rather than answer the questions presented, the Respondent seeks to avoid the questions and reposition this case as a noncontroversial matter regarding whether the *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982) decision is still valid. *See* BIO at 14. The Respondent's answer, to their own question, that "no circuit split" exists regarding "this issue" (*i.e.*, the validity of *Rowley*) is simply an attempt to mischaracterize the scope and importance of the Petitioners' questions.

The validity of *Rowley* has never been in doubt, however, the applicability of *Rowley*, specifically its "due weight" deference and educational benefit analysis — in the judicial evaluation regarding a child's IDEA eligibility, is part of the larger question being raised by the Petitioners. *See* Pet. at 29. This case squarely presents the question whether the "clear error"[1] standard of review is appropriate in the judicial review of an educational agency's denial of IDEA eligibility. Contrary to the Respondent's

---

[1] "While the Seventh Circuit uses the term 'clear error' to denote the deferential standard . . . we think the preferable term is 'abuse of discretion.' See *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). 'Clear error' is a term of art derived from rule Rule 52(a) of the FRCP, and applies when reviewing questions of fact." *Ornelas et al. v. United States*, 517 U.S. 694-95 (1996)

assertions, this issue has bedeviled the circuit courts, causing a well defined 4-3 split.

2. The Court Of Appeals Split Is Real, Intractible, And Warrants This Court's Intervention

The Respondent contends that "the *Rowley* standard of review . . . applies to all cases arising under the IDEA," see BIO at 17. They cite several court of appeal cases in support of their claim[2] (*see id.*, 15–23), but offer no authority in coming to this conclusion. The Repondent's claim that a "multi-tiered review" involving "one comprehensive judicial standard of review [being] uniformly applied by the circuit court of appeals" is misfounded.

In IDEA eligibility cases, which involve statutory criteria, four court of appeals conduct a de novo standard of review when evaluating such cases, as a mixed question of law and fact. *See* Pet. at 18. In a direct split, the Fourth, Seventh and Ninth circuits apply a "clearly erroneous" or abuse of discretion review. They treat the denial of IDEA eligibility as [primarily] a question of fact, and accord 'due weight' to the agency's findings. *See* Pet. at 23-26. The Respondent's contention, that the "*Rowley* Court" determined the proper "judicial standard to apply" in "all cases arising under the IDEA" (see BIO at 16-17), is misplaced, and is contradicted by the 4-3 split

---

[2] Of the 48 appellant court cases cited by the Respondent, 45 were cases involving sufficiency of a child's IEP, the provisions of FAPE or an LRE/placement issue. Only 3 of the cases cited involved IDEA eligibility.

among the circuits.

A determination that a child is not a child with disability is a mixed question of law and fact, and involves statutory and regulatory definitions applied to facts surrounding the child's disabilities and educational needs. The Respondent's assertion that, "[w]hether the issue at judicial review is the appropriateness of a student's IEP, a hearing officer's award for reimbursement, or a student's eligibility for special education and related services, the *Rowley* standard of review still applies" *see* BIO at 17 (case references omitted) is simply wrong and incorrectly presumes the *Rowley* "due weight" deference is required in all cases. Contrary to the Respondent's assertions, at least four court of appeals have held that both reason and the law militates requiring *Rowley* deference to an agency's decision denying IDEA eligibility. *See* Pet. at 26-28.

3. The *Rowley* "Due Weight" Deference Is Not Applicable In Testing For IDEA Eligibility

The Responent's claim that an inquiry into whether a child is eligible for IDEA access is identical to that of whether a child is receiving an "appropriate" education is misplaced and certainly not a result of *Rowley*. The "*Rowley* standard" for determining the appropriateness of a child's IEP and its ensuing deference was accorded because of the factfinder's inherent expertise on "technical matters foreign to the experience of most courts." See *Young v. Romeo*, 457 U.S. 307, 323 (1982) (citing *Bell v. Wolfish*,

441 U.S. 520, 544 (1979), and its observation that "[c]ourts should not second-guess the expert administrators on matters which they are better informed."

In *Rowley*, this Court faced the issue of "what is meant by the [IDEA's] requirement of a 'free appropriate education.'" *Id.* at 186. "*Rowley* focused on the *level* of services and the quality of programs that a *state* must provide, not the criteria for *access* to those programs. *Id.* at 189, 202." *Timothy W. v. Rochester N.H. High Sch. Dist.*, 875 F.2d 971 (CA1 1989).

Inapposite, the Petitioners' question involves the appropriate standard of review for IDEA cases involving the denial of access. While the propriety of an IEP hinges on whether it provides FAPE, as defined by this Court in *Rowley*, IDEA eligibility hinges on whether the child is a "child with a disability," in accordance with the statute,[3] and federal and state regulations. The child's disability must "adversely affect [their] educational performance," per 34 C.F.R. § 300.8(c)(4)(i) and (c)(9)(i) and, by reason thereof "need special education and related services" 34 C.F.R. § 300.8, in accordance with the State's plan.

An IDEA eligibility dispute doesn't involve a child's IEP, (the child has never received one), the agency's educational methodologies or the agency's expertise. It strictly involves the child's statutory guarantee to receive a 'free appropriate public education' in accordance with the Act.

No authority from *Rowley* imposed requirements of "due weight" upon the court of

[3] See 20 U.S.C. § 1401(3)(A)(1)(i)

appeals when testing for IDEA eligibility. Further, this Court in both *Cedar Rapids Comm. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999) and *Irving Indep. Sch. Dist. v. Tatro*, 486 U.S. 883 (1984) emphasized that meaningful access to a public education was the primary purpose of the IDEA, and reiterated the undisputed fact that the services at issue must be provided, if the students in question were going to remain in school.

4. Under IDEA, Eligibility Is Determined In Compliance With Federal and State Regulations – The Majority Of Circuits Review As A "Mixed Question Of Law and Fact"

Whether a student qualifies as "a child with disability" under § 1401(3) poses a mixed legal and factual inquiry. "[W]hether district court accurately applied statutory and regulatory terms in IDEA and Vermont implementing regulations to J.D.'s educational and emotional history is a mixed question of law and fact, which we review de novo." *J.D. ex rel. J.D. v. Pawlet School Dist.*, 224 F.3d 60 (CA2 2000).

34 C.F.R. § 300.304 requires the use of "variety of assessment tools and strategies to gather relevant functional, developmental, and academic information . . . in determining whether the child is a child with disability under § 300.8."

A. The *Rowley* "Educational Benefit" Analysis Is Not Applicable In Determining A Child's Eligibility For Special Education

In IDEA eligibility testing, a child's need for special education and related services is determined in accordance with the State's plan — not in accordance with *Rowley*. A determination that a child is not a child with disability because they were "achieving" in light of the *Rowley* educational benefit measurement, (i.e., passing grades and academic performance) is misplaced and fails to take into account the State's education performance requirements.[4] See Pet. at 29-32.

The Respondent's contention that the *Rowley* educational benefit may be a consideration in deciding a child's need for special education is completely off the mark. *See* BIO at 26. The extent a child's disability exerts an adverse effect on their educational performance is measured by the state's criteria. *See Mr. I v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 9 (CA1 2007). Though the IDEA "establishes a basic floor of education" for children with disabilities,

---

[4] In the Petitioner's case, the educational agency found the child was ineligible for services because it alleged her diabetes and emotional issues did not adversely affect "her ability to make *educational progress*." (See. Pet. at A103). In coming to this decision, the agency inappropriately narrowed the scope of its inquiry to the child's academic progress, and did not consider her social emotional difficulties (a requirement) under the State's educational performance standard.

guaranteeing them "[a] free appropriate public education," 20 U.S.C. § 1412(a)(1)(A), it does not displace the states from their traditonal role in setting their own educational policy. *See Burlington,* 736 F.2d at 788-89; *see also J.D.*, 224 F.3d at 65; *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (CA5 1989).

The Department of Education has issued regulatory definitions, outlining each of the qualifying disabilities, and, with one exception, they must "adversely affect [ ] a child's educational performance." *Id.* § 300.8(c)(1)-(c)(13). The regulation does not expand on this phrase, nor does it defer to *Rowley*. Instead, it leaves "to each State to give substance to these terms." *J.D.*, 224 F.3d at 65.

Whether the balance of these factors tips towards eligibility depends on the manner in which the specific disability afflicts the student and adversely effects the child's "educational performance," as determined within the State's plan. In Illinois, educational performance[5] is defined as;

> "[a] student's academic achievement and ability to establish and maintain social relationships and to experience a sound emotional development in the school environment."

The Respondent's reliance on *Rowley's* educational benefit analysis — and the appellate courts[6] who utilize this measurement in their

---

[5] See Illinois Admin. Code Tit. 23 § 226.75

[6] The Fourth, Seventh and Ninth circuits.

IDEA eligibility testing, are making a categorical mistake. See Pet. at 29. This Court refused to "establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the [IDEA]," *id.* at 202, and explictly stated the intent of the [Act] was to provide "*access* to specialized instruction and related services." *Id.* at 201. Further, this Court clarified that the *Rowley* decision wasn't applicable in cases involving IDEA eligibility;

> "[B]ecause in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation." *Id.* at 202.

5. The Clear Error/Abuse of Discretion (i.e., "*Rowley* Standard") Is Inappropriate For Issues Involving Statutory Interpretation – The Circuit Split Exists As A Result

The Petitioners' have alleged their school district has failed to fulfill its statutory obligations under the IDEA. Within its narrow framework — of strict deference to the state decision-makers, (in accord with *Rowley),* the Fourth, Seventh and Ninth circuits[7] begin their IDEA judicial review by looking at the adequacy

---

[7] In *Winkelman*, 127 S.Ct. at 2000, this Court recognized that a "proper interpretation" of IDEA "requires a consideration of the entire statutory scheme."

of the factual findings at the district court level. Only a determination of historical facts is involved at this point, and looking for adequate factual findings made by the district court and reviewing them for "clear error" is a task all the circuits complete — regardless whether they use a de novo, modified de novo or a clear error review standard.

The circuit court split occurs with the second part of the analysis. Unlike their counterparts, the Fourth, Seventh and Ninth circuits review the district court determination for "clear error" (or abuse of discretion) and consider a denial of IDEA eligibility (whether a child is a "child with disability") as primarily a question of fact.[8]

In a direct split, the remaining circuits treat such findings as a "mixed question of law and fact" and apply statutory criteria to the examination of IDEA eligibility. *See Timothy W.*, 875 F.2d 954, 961, *cert denied*, 493 U.S. 938, 110 S.Ct. 519, 107 L.Ed.2d 520 (1989); *Yankston Sch. Dist. v. Schramm*, 93 F.3d 1369, 1374 (CA8 1996) and *Weixel v. Bd. of Educ.*, 287 F.3d 138, 150 (CA2 2002) ("IDEA's coverage is not limited to students with 'learning disabilities' . . ."). In addition, these remaining circuits traditionally conduct a de novo review regarding matters involving statutory implications. "[S]tatutory interpretation questions are issues of law, which we review de novo." *Ammex Inc. v. United States*, 367 F.3d 530, 533 (CA6 2004).

---

[8] Contrary to the Respondent's assertion, the Seventh Circuit did not review the Petitioners' case under the de novo review standard – see Pet. at A-7.

Further, this Court has previously instructed the Seventh Circuit of this requirement, *see Ornelas et al v. United States,* 517 U.S. at 696-97;

> "[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard v. Swint,* 456 U.S. 273, 289 n. 19 (1982).

Where the "relevant legal principle can be given meaning only through its application to the particular circumstances of a case, the Court has been relunctant to give the trier of fact's conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law." *See Miller v. Fenton,* 474 U.S. 104, 114 (1985)

6. De Novo Review Is The Only Appropriate Standard For Cases Involving IDEA Statutory Interpretation

The appellate standard of review is critically important to the outcome of a case.[9] A

---

[9] "[I]f the question of law were reviewed under the deferential standard . . . which permits reversal only for clear error, then [we] would affirm; but, if [we] were to review the determination under an independent de novo standard, [we] would reverse." *See Matter of McLinn,* 739 F.2d 1395, 1397 (CA9 1984).

consistently applied appellate standard of review should eliminate the varied results occuring with IDEA eligibility cases,[10] provide equal *access* for *all* children with disabilities and support the unitary system of law required by this Court.

In *Rowley*, this Court faced the issue of "what is meant by the [IDEA's] requirement of a 'free appropriate education.' This case involves the appropriate standard of review in testing for IDEA eligibility. The Respondent's contend the inquiry is identical. However, *Rowley* did not so hold. *Rowley* did not impose either its "due weight" deference or "educational benefit" analysis in the testing for IDEA eligibility. At least four court of appeals concur. *See* Pet. 21-22.

7. Nothing About This Case Would Result In A Fact-Bound Decision From The Court Or Prohibit It From Deciding The Question Presented

A case will typically make a poor vehicle for deciding a legal issue when the issue is fact-bound, see Robert L. Stern *et al.*, Supreme Court Practice 455 (8th ed. 2002) (suggesting that certiorari is unlikely when "the decision below turns upon its own facts" and, as a result, "will affect few others besides the litigants"); *accord, id.* at 459. or when other grounds for affirmance may preclude the Court from reaching the question presented, *see id.* at 455. Neither concern is present here.

---

[10] See Mark C. Weber, *The IDEA Eligibility Mess*, Buffalo Law Review, Vol. 57:1 83 (2009).

First, Respondent's [only] assertion that this case is not the proper vehicle for a grant of certiorari, "because the Seventh Circuit properly decided the Petitioners' case," BIO at 27 is essentially a restatement of the question presented; whether the *Rowley* review standard is proper when testing for IDEA eligibility? Clearly, this is the only fact germane to the legal issue presented. All other underlying facts and all other documents from the record below, although providing context to the other disputes between the parties, are legally irrelevant to the IDEA eligibility question presented.

Second, this question affects thousands of disabled children in their ability to *access* educational services, and receive the IDEA's promise and guarantee. In the situation presented here, where a fully mature conflict in the circuits is squarely presented, and there is no chance that the issue as it affects the parties before the Court will be resolved without the Court's intervention – there is no reason to put this important review off for another day.

CONCLUSION

The petition for a writ of certiorari should be granted.

February 19, 2010 Respectfully submitted,

s/Thomas, Glenna & Kayla Loch ("the Loch's)
5 Goldenrod Lane
Edwardsville, Illinois 62025
(618) 656-1908 (Home)
(314) 952-3960 (Cell)
goshenpatriots@msn.com